Supreme Court, U.S.
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No. 08-947

In The
Supreme Court of the United States

THE BANDER FAMILY PARTNERSHIP, L.P.,
Petitioner,

v.

TOWERHILL WEALTH MANAGEMENT, LLC,
TOWERHILL US EQUITIES, LLC,
TOWERHILL INTERNATIONAL EQUITIES, LLC,
and TOWERHILL LONG/SHORT EQUITY, LLC,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 16(a)(2) of the Federal Arbitration Act, 9 U.S.C. §16(a)(2), read in conjunction with the Supremacy Clause, U.S. Const. Art. VI, cl. 2, give Petitioner a right of interlocutory appeal from a state trial court's preliminary injunction against continuing an arbitration previously and properly commenced pursuant to an agreement that is subject to the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* (the "FAA")?

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PETITION FOR A WRIT OF CERTIORARI

The Bander Family Partnership, L.P. ("Bander") petitions the Court to issue a writ of certiorari to the Supreme Court of the State of Delaware so as to review that court's final Order entered in its Case No. 474, 2008 (the "Order").

OPINIONS BELOW

The Order is not officially reported, but is unofficially reported at *The Bander Family P'ship, L.P. v. TowerHill Wealth Mgmt., LLC*, No. 474, 2008, 2008 WL 4809456 (Del. Supr. Nov. 3, 2008) and is reproduced at Appendix A.

The Delaware Court of Chancery's letter decision issued October 9, 2008 denying Bander's Application for Certification of an Interlocutory Appeal is not officially reported, but is unofficially reported at *TowerHill Wealth Mgmt., LLC, v. The Bander Family P'ship, L.P.*, No. 3830-VCS, 2008 WL 4615865 (Del. Ch. Oct. 9, 2008) and is reproduced at Appendix B.

The Delaware Court of Chancery's order dated September 8, 2008 sustaining Respondents' (Plaintiffs below) motion for a preliminary injunction is not officially or unofficially reported.[1] The September 8, 2008 order, and the hearing transcript in which the

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[1] The judicial action f rm preceding the court's formal order is unofficially reported at *TowerHill Wealth Mgmt., LLC, v. The Bander Family P'ship, L.P.*, No. 3830-VCS, 2008 WL 3998524 (Del. Ch. Aug. 22, 2008) and is reproduced at Appendix D.

Delaware Court of Chancery's reasoning for it is expressed, are reproduced at Appendices C and E.

JURISDICTION

The Order was entered November 3, 2008. This Petition is being filed within 90 days of that date. This Court has jurisdiction to review the Order pursuant to 28 U.S.C. §1257(a). *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-87 (1975); *see also, Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, cl. 2 of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA, 9 U.S.C. §2, states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration

> an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 16(a)(2) of the FAA, 9 U.S.C. §16(a)(2), provides that:

> An appeal may be taken from - -
>
> * * * *
>
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; . . . .

Article IV, Section 11(4) of the Delaware Constitution states that:

> The Supreme Court shall have jurisdiction as follows:
>
> * * * *
>
> (4) To receive appeals from the Court of Chancery and to determine finally all matters of appeal in the interlocutory or final decrees and other proceedings in chancery.

Section 161 of Title 10 of the Delaware Code, Del. Code Ann. tit. 10, § 161 (West, Westlaw through 2009

legislation),[2] prescribes the Delaware Supreme Court's rulemaking authority as follows:

> (a) The Supreme Court may, from time to time, adopt and promulgate general rules, or where it deems it best for the advancement of justice may make special orders, which establish terms of the Court, provide for the holding of regular and special sessions, fix the time of and otherwise regulate the return of process issued out of the Court, fix the fees which shall be paid and the costs which shall be taxed in the Court, provide for the conduct of the business of the Court, and regulate the practice and procedure governing causes and proceedings in the Court.
>
> (b) The Rules of the Supreme Court shall, after they have taken effect, supersede all statutory provisions in conflict or inconsistent therewith.
>
> (c) The Rules shall not abridge, enlarge or modify any substantive right of any party.

Rule 42 of the Delaware Supreme Court Rules, Del. Sup. Ct. R. 42, provides, in pertinent part:[3]

> **(a) Exercise of Jurisdiction.** The Court's jurisdiction to hear and determine appeals in

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[2] All statutory references are to West, Westlaw through 2009 legislation unless otherwise noted.

[3] The full text of this Rule is set forth in Appendix H, 44a-50a.

civil cases from interlocutory orders of a trial court . . . shall be exercised in accordance with this rule as to certification and acceptance of interlocutory appeals. . . .

* * * *

(d) Procedure for acceptance of Interlocutory Appeals in the Supreme Court. No interlocutory order shall be reviewed by this Court unless the appeal therefrom has been accepted by this Court in accordance with the following procedure:

* * * *

(v) *Action by This Court.* Unless otherwise ordered, this Court shall thereupon and without further argument determine in its discretion whether to accept or refuse the interlocutory appeal.

* * * *

STATEMENT OF THE CASE

A. Introduction.

This case arises out of the Delaware Supreme Court's refusal to hear Bander's interlocutory appeal from a preliminary injunction against an arbitration Bander commenced with its investment advisor, Respondent TowerHill Wealth Management, LLC (the "Advisor").

Bander and the Advisor became embroiled in a dispute when Bander attempted to sever its relationship with the Advisor. Bander initiated an arbitration to resolve the dispute, invoking the arbitration clause of a written investment advisory agreement between Bander and the Advisor. The Advisor participated in the arbitration, but, joined by the other Respondents, also sued Bander in the Delaware Court of Chancery to secure an injunction against the arbitration.

The Delaware Court of Chancery preliminarily enjoined Bander from pursuing the arbitration. App. C, 19a. Relying on Section 16(a)(2) of the FAA, 9 U.S.C. §16(a)(2), Bander appealed to the Delaware Supreme Court for relief from the injunction. App. G, 72a-74a.

Bander's request for interlocutory appellate review of the injunction was initially evaluated by the Delaware Court of Chancery pursuant to Del. Sup. Ct. R. 42(c). That court opined that the right of appeal from injunctions against arbitration prescribed by 9 U.S.C. §16(a)(2) is unavailable in state courts. App. B, 7a n.3. The Delaware Supreme Court then refused Bander's appeal. App. A, 2a-3a. That refusal raises the question presented in this Petition.

B. The Parties and Their Relationships.

Bander is a Missouri limited partnership created to hold and invest assets for its partners. The Advisor is a Delaware limited liability company registered with the United States Securities and Exchange Commission and doing business as an investment

advisor. Both Bander and the Advisor have their only offices in Missouri.

Bander and the Advisor entered into a written investment advisory agreement in 2005. App. G, 103a-19a.[4] That agreement prescribes how the Advisor will manage the investment of Bander's assets and the compensation to be paid the Advisor by Bander. Section 17 of the investment advisory agreement provides that:

> Any controversy or claim arising out of or relating to this Agreement, or to the interpretation, breach or enforcement thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association . . .

App. G, 111a.

As contemplated by the investment advisory agreement, portions of Bander's assets under management by the Advisor were invested in and managed through Respondents TowerHill US Equities, LLC ("US Equities"), TowerHill International Equities, LLC ("International Equities") and TowerHill Long/Short Equity, LLC ("Long/Short Equity")

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[4] When the investment advisory agreement was made, the Advisor was using the name Capital Private Wealth Management, LLC. The Adviser subsequently changed its name to TowerHill Wealth Management, LLC.

(collectively, the "Investment LLCs").[5] Each Investment LLC is a Delaware limited liability company managed by the Advisor.

C. The Origins of This Case.

Bander attempted to terminate its relationship with the Advisor at the end of 2007. Disputes arose over Bander's rights to information about its investments, when the proceeds of Bander's investments in the Investment LLCs were distributable to Bander, and Bander's right to interest on the undistributed proceeds. Bander invoked the investment advisory agreement's arbitration clause and demanded that the Advisor arbitrate these disputes pursuant to the Commercial Arbitration Rules of the American Arbitration Association (the "AAA"). App. G, 124a.

The Advisor answered Bander's demand for arbitration, and otherwise participated in the AAA arbitration process until Bander was enjoined from pursuing the arbitration. Before the Advisor began participating in the arbitration, however, Respondents sued Bander in the Delaware Court of Chancery. Respondents asked the Court of Chancery to preliminarily and permanently enjoin the arbitration

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[5] App. G, 103a, 113a-14a. Subsequent to the execution of the investment advisory agreement, the name of each Investment LLC was changed. US Equities is the entity referred to in the advisory agreement as Newport Net Performance, LLC. International Equities is the entity referred to in the advisory agreement as CPW International Equities, LLC. Long/Short Equity is the entity referred to in the advisory agreement as Capital Private Wealth Stock Selection, LLC.

and to enter a declaratory judgment that would effectively resolve in the Advisor's favor the disputes Bander submitted for arbitration. In support of the requested injunction, Respondents argued that the dispute Bander submitted for arbitration is not arbitrable pursuant to the investment advisory agreement's arbitration clause because Bander's claims against the Advisor are predicated upon alleged breaches of the Investment LLCs' operating agreements.[6]

Bander moved to dismiss the lawsuit and opposed Respondents' motion for a preliminary injunction against the arbitration. Bander argued (among other things) that because the Advisor had agreed with Bander that their disputes would be resolved through arbitration conducted pursuant to the AAA's Commercial Arbitration Rules, the question of arbitrability of disputes pursuant to the advisory agreement's arbitration clause was for the arbitrators, not the courts, to decide.[7] The Court of Chancery

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[6] Each Investment LLC's operating agreement provides that the "Manager" and "Members" agree to submit to the jurisdiction of the Delaware Court of Chancery for resolution of disputes arising under or in connection with the operating agreement, but requires the dispute be submitted to non-binding arbitration or mediation before the Court of Chancery's jurisdiction is invoked. App. G, 84a. Bander disputed Respondents' rights to rely on these provisions because, among other things, Respondents insisted that Bander was no longer a member of the Investment LLCs and because Respondents had not invoked the non-binding dispute resolution procedures before suing Bander. The Court of Chancery held these arguments unavailing. App. E, 56a-57a.

[7] This Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) and *First Options of Chicago, Inc. v.*

acknowledged the cases adopting and applying this rule of decision, but held the rule was not controlling in the circumstances of this case. App. E, 52a-54a. It denied Bander's motion to dismiss the lawsuit, and preliminarily enjoined Bander from pursuing the pending AAA arbitration. App. C, 18a-19a.

Bander promptly (and timely) appealed from the injunction to the Delaware Supreme Court. App. G, 72a-75a. The Delaware Supreme Court refused Bander's appeal. App. A, 3a.

D. Delaware's Interlocutory Appellate Process.

Delaware's constitution vests the Delaware Supreme Court with jurisdiction over appeals from both final and interlocutory orders of the Delaware Court of Chancery. Del. Const. Art. IV, §11(4). By statute, the Delaware Supreme Court is authorized to promulgate rules regulating the practice and procedure in that court. Del. Code Ann. tit. 10, § 161(a). The statute provides that the court's rules "supersede all statutory provisions in conflict or

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Kaplan, 514 U.S. 938, 943 (1995) have been widely interpreted to mean that issues of arbitrability are to be decided by the arbitrators, not the courts, when parties have agreed to arbitrate pursuant to rules which, like the AAA's Commercial Arbitration Rules, expressly vest arbitrators with authority to decide questions of their jurisdiction. *See, e.g., Terminix Intern. Co., L.P. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 120-122 (2d Cir. 2003). The Delaware Supreme Court indicated its concurrence with this rule of decision in *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006), but found an exception in the circumstances of that case.

inconsistent therewith." Del. Code Ann. tit. 10, § 161(b). It further provides, however, that the rules "shall not abridge, enlarge or modify any substantive right of any party." Del. Code Ann. tit. 10, §161(c).

The Delaware Supreme Court adopted Rule 42 to govern interlocutory appeals in the Delaware courts. In that Rule, the Delaware Supreme Court announced that it "shall . . . determine *in its discretion* whether to accept or refuse" any interlocutory appeal. Del. Sup. Ct. R. 42(d)(v) (emphasis supplied). The Rule spells out the criteria that guide the court in deciding whether to hear an interlocutory appeal. Del. Sup. Ct. R. 42(b). It also prescribes the process litigants and the courts must follow for litigants to obtain immediate appellate review of interlocutory orders. Del. Sup. Ct. R. 42(c) & (d).

Essentially, a litigant seeking to appeal from a Delaware trial court's interlocutory order must file an application for certification with the trial court that entered the order and file a notice of appeal with the Delaware Supreme Court. The opposing party may respond to the application. The trial court then opines whether the appeal should be certified under the criteria spelled out in Del. Sup. Ct. R. 42(b), but its opinion does not control or limit the supreme court's discretion to hear the appeal. The trial court's decision is presented to the supreme court (along with the litigant's application and any response filed by opposing parties). The supreme court then decides whether to accept or refuse the appeal. Del. Sup. Ct. R. 42.

E. Bander Timely And Properly Invoked Its Appeal Rights Under 9 U.S.C. §16(a)(2).

As required by Del. Sup. Ct. R. 42, Bander filed an application for certification of its interlocutory appeal with the Court of Chancery within 10 days of the entry of the preliminary injunction (App. G, 78a, 102a), filed its notice of appeal with the Delaware Supreme Court within 30 days of the issuance of the preliminary injunction (App. G, 72a), and complied with the requirements of Del. Sup. Ct. R. 42. Bander also moved, first in the Court of Chancery, and then in Supreme Court, to stay the Court of Chancery's proceedings pending resolution of Bander's appeal from the preliminary injunction. Each of these filings made clear that Bander was appealing from the preliminary injunction as a matter of right pursuant to 9 U.S.C. §16(a)(2).

Bander's Notice of Appeal From Interlocutory Order, filed September 17, 2008 with the Delaware Supreme Court stated, in pertinent part:

> PLEASE TAKE NOTICE that pursuant to 9 U.S.C. §16(a)(2), . . . The Bander Family Partnership, L.P. (the "Partnership") does hereby appeal to the Supreme Court of the State of Delaware from the order of the Court of Chancery dated September 8, 2008 (the "Order") enjoining an arbitration . . . .

App. G, 73a. Bander's Application for Certification of an Interlocutory Appeal filed with the Court of Chancery on September 17, 2008 (and with the Delaware Supreme Court as Exhibit B to the Notice of Appeal From Interlocutory Order) pointed out that:

> The Partnership [Bander] has a statutorily prescribed right of immediate appeal from the Order insofar as it enjoins the arbitration commenced by the Partnership. 9 U.S.C. §16(a)(2); 10 *Del. C.* §5719(a)(2).

App. G, 82a.

The Court of Chancery issued a letter opinion on October 9, 2008 denying Bander's application for certification and its motion to stay proceedings in the Court of Chancery pending its appeal. App. B. Bander filed the Court of Chancery's opinion with the Delaware Supreme Court (as required by Del. Sup. Ct. R. 42(d)(iii)), then moved the Delaware Supreme Court to order the Court of Chancery's proceedings stayed pending Bander's appeal. In that motion (filed October 20, 2008), Bander again brought to the Delaware Supreme Court's attention Bander's claimed right to an immediate appeal pursuant to 9 U.S.C. §16(a)(2), stating:

> 5) After commencing this appeal, which is as of right pursuant to 9 U.S.C. §16(a)(2) . . . .

App. F, 68a. Bander's motion to stay also noted:

> No case cited by the Court of Chancery holds that 9 U.S.C. §16(a)(2) applies only to proceedings in federal courts, or that 10 *Del. C.* §5719(a)(2) applies only to arbitration agreements providing for arbitration hearings in Delaware. Neither statute's text suggests that it is so limited . . . .

App. F, 69a n.1.

F. The Delaware Courts' Refusals To Recognize Bander's Federally Prescribed Right To An Interlocutory Appeal From An Injunction Against Arbitration.

The Court of Chancery denied Bander's application to certify the interlocutory appeal and Bander's motion to stay proceedings in the Court of Chancery pending the conclusion of the interlocutory appeal. App. B, 5a. In a footnote to its opinion explaining these decisions, the Court of Chancery acknowledged Bander's claim that it has a right of immediate appeal from the court's injunction pursuant to Section 16(a)(2) of the FAA. Appendix B, 7a n.3. However, the Court of Chancery rejected the very existence of the claimed federal right of appeal because, in its view,

> Section 16 of the FAA, which governs the taking of appeals, is a procedural rule directed to the federal courts. Where an action involving an arbitration agreement is brought in state court, "the FAA does not require submission to federal procedural law, and each state is free to apply its own procedural requirements so long as those procedures do not defeat the purposes of the Act." 21 Williston on Contracts § 57:5 (4th ed.).

App. B, 7a n.3.

The Delaware Supreme Court refused Bander's appeal and denied Bander's motion to stay. App. A, 3a. Its Order does not acknowledge that Bander asserted a right of appeal pursuant to federal law, much less explain why the court refused to recognize and give effect to that right. It simply declared that Bander's

application did not raise the types of issues Del. Sup. Ct. R. 42 recognizes as justifying immediate interlocutory review and on that basis refused to hear Bander's appeal. App. A, 2a.

G. The Consequences Of The Delaware Courts' Refusals To Recognize And Allow Bander To Exercise The Right Of Appeal Pursuant To 9 U.S.C. §16(a)(2).

Because Respondents seek a declaratory judgment of non-liability to Bander on the claims Bander submitted for arbitration, in the absence of intervention by this Court the factual and legal issues Bander seeks to resolve through arbitration with the Advisor will be adjudicated by the Court of Chancery before any appellate review of the Court of Chancery's injunction against arbitration of those claims can be obtained.[8] As a result, Bander will be effectively deprived of the benefits of its agreement to arbitrate disputes with the Advisor – benefits Congress intended to protect in enacting Section 2 of the FAA – if its right of appeal created by Section 16(a)(2) of the FAA is not recognized and enforced.

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[8] Rule 13(a), Del. Ch. Ct. R., like Rule 13(a), Fed. R. Civ. P, requires defendants to plead as counterclaims those claims they hold against plaintiffs that arise out of the same transaction or occurrence that gives rise to the plaintiff's claim. To preserve its claims, Bander has asserted as counterclaims the claims it originally submitted for arbitration in the proceeding enjoined by the Court of Chancery.

REASONS FOR GRANTING THE WRIT

A. Whether 9 U.S.C. §16(a)(2) Creates A Right Of Appeal From State Courts' Interlocutory Orders Enjoining Arbitrations Is An Important Federal Question.

It is widely recognized that immediate appellate review of court orders adverse to arbitration rights is necessary to secure the benefits of arbitration agreements Congress sought to protect when it enacted the FAA. In *Southland*, for example (in the context of explaining why the Court had jurisdiction pursuant to 28 U.S.C. §1257), this Court observed:

> [f]or us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate.

Southland, 465 U.S. at 7-8. The United States Court of Appeals for the Seventh Circuit has similarly stated:

> Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. The worst possible outcome would be to litigate the dispute, to have [an appellate court] reverse and order the dispute arbitrated, to arbitrate the dispute, and

> finally to return to court to have the award enforced.

Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 128 F.3d 504, 506 (7th Cir. 1997). Even several of the state courts of last resort which have held Section 16 of the FAA inapplicable in state court proceedings recognized that some form of interlocutory appellate review of trial court orders adverse to arbitration rights is essential because in its absence, parties:

> would be deprived of the benefits of the arbitration clause [they] contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated.

Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266, 272-73 (Tex. 1992) (allowing review of interlocutory order adverse to arbitration via writ of mandamus); *accord, American Gen. Fin. Svc. v. Vereen*, 282 Ga. App. 663, 665-66, 639 S.E. 2d 598, 601 (Ga. Ct. App. 2007); *Berger Farms v. First Interstate Bank*, 148 Or. App. 33, 38-40, 939 P.2d 64, 69 (Or. Ct. App. 1997), *overruled by Bush v. Paragon Property, Inc.*, 165 Or. App. 700, 997 P.2d 882 (Or. Ct. App. 2000).

Prior to its amendment in 1988, the FAA did not address rights of appeal from decisions addressing arbitration rights. The inability of parties to obtain immediate appellate review of trial court orders that refused enforcement of arbitration agreements or actually enjoined arbitration proceedings was an observed shortcoming of the statute. D. Siegel, Practice Commentary: Appeals from Arbitrability

Determinations, 9 U.S.C.A. §16. Because many, if not most, such orders were interlocutory in nature, litigants were often unable to secure appellate review until after the underlying dispute was fully adjudicated in the court which refused to enforce the arbitration agreement or enjoined the arbitration. *Id.*

Until the FAA was amended in 1988, the availability of immediate appellate review of orders adverse to claimed arbitration rights varied not only based on the type of order entered by the trial court – i.e., whether it was interlocutory or final, and whether it took the form of an injunction against arbitration or the denial of a motion to stay a court's own proceedings pending arbitration – but also between jurisdictions. For example, interlocutory injunctions against arbitration rendered by federal district courts were immediately appealable pursuant to 28 U.S.C. §1292(a). *See, e.g., Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 n.1 (5th Cir. 1985) (holding "[a]n order staying arbitration pending disposition of litigation before the court is an appealable interlocutory order granting an injunction under 28 U.S.C. § 1292(a)(1)."); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833 (7th Cir. 1977). An otherwise identical interlocutory injunction against arbitration issued by a state court, however, was often unappealable on an interlocutory basis. *See, e.g., Peloquin Assocs., P.A. v. Polcaro*, 61 N.C. App. 345, 300 S.E. 2d 477 (N.C. App. 1983); *P. Agnes, Inc. v. Philadelphia Police Home Ass'n*, 439 Pa. 448, 266 A.2d 696 (Pa. 1970).[9]

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[9] In 1988, approximately 40 percent of the states had statutes similar to 28 U.S.C. § 1292(a) providing for immediate appellate

Against this backdrop, Congress amended the FAA in 1988 by enacting the provisions now codified at 9 U.S.C. §16. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 84 (2000). It has been suggested that this section was enacted primarily to clarify the circumstances in which appeals can be taken from federal courts' orders relating to arbitration. *See, e.g.*, D. Siegel, Practice Commentary: Appeals from Arbitrability Determinations, 9 U.S.C.A. §16; H.R. Rep. No. 100-889, 36-37 (1988).[10] Several

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review of any interlocutory injunction. *See, e.g.*, Cal. Civ. Proc. § 904.1(a)(6) (originally enacted 1968); Kan. Stat. Ann. § 60-2102(a)(2) (originally enacted 1963); Mass. Gen. Laws ch. 231, § 118 (originally enacted 1973). These statutes were not uniform in their scope, however. Some states' statutes virtually mirrored the provisions of 28 U.S.C. §1292(a), *see, e.g.*, Mass. Gen. Laws Ann. ch. 231, § 118 and S.D. Codified Laws § 15-26A-3 (1986), while others more narrowly defined the types of interlocutory orders relating to injunctions that were immediately appealable (*see, e.g.*, Ga. Code Ann. § 5-6-34(a) (1984); Mo. Rev. Stat. § 512.020 (1943)). Another group of states granted the right of interlocutory appeal from *some* injunctions against arbitrations – those issued pursuant to Section 2(b) of the Uniform Arbitration Act of 1956 (the "1956 UAA") as enacted by their legislatures – but not from others. *Cf. P. Agnes*, 266 A.2d at 697 (distinguishing between interlocutory injunctions against arbitrations governed by common law, which were not appealable, and interlocutory injunctions against arbitrations to be conducted pursuant to a precursor of the 1956 UAA, which were appealable). A final subset of states had not enacted either a statute providing for appellate review of interlocutory injunctions generally or one providing specifically for interlocutory appeals from some types of injunctions against arbitrations. In these states, interlocutory appeals from injunctions were unavailable as a matter of right. *See, e.g., Peloquin*, 300 S.E. 2d at 477-78.

[10] In *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 880 n.7 (1994) this Court commented that the then recently enacted

subsections of Section 16 of the FAA, by their express terms, can apply only to appeals from federal courts' orders.[11] The text of Section 16(a)(2) of the FAA, 9 U.S.C. §16(a)(2), however, contains no terms that would limit its application to orders entered by federal courts. It provides simply that:

> An appeal may be taken from –
>
> (2) an interlocutory order granting, continuing or modifying an injunction against an arbitration that is subject to this title.

9 U.S.C. §16(a)(2).

Since the right of immediate appeal from any interlocutory order rendered by a federal district court "granting, continuing, modifying, refusing or dissolving injunctions" was already codified in 28 U.S.C. §1292(a) when Congress enacted Section 16 of the FAA, two inferences arise from the enactment of Section 16(a)(2) of the FAA. First, (since there was no need to legislate a right of interlocutory appeals from federal court orders enjoining arbitrations) Congress intended to create a federally prescribed right of

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Section 16 of the FAA provides for "immediate appeal when a District Court rejects a party's assertion that, under the Arbitration Act, a case belongs before a commercial arbitrator and not in court ...."

[11] 9 U.S.C. §16(a)(1)(B), for example, addresses the appealability of orders denying motions to compel arbitration made pursuant to Section 4 of the FAA, 9 U.S.C. §4. Section 4 only purports to authorize motions to compel arbitration to be filed with federal courts. *Id.*; *see Southland*, 465 U.S. at 16 n.10.

interlocutory appeal from state courts' injunctions against arbitrations that are subject to the FAA. *Cf. Independent Ins. Agents of Am., Inc. v. Hawke,* 211 F.3d 638, 643-44 (D.C. Cir. 2000) (recognizing that a newer statute should not be construed to duplicate the purpose or effect of an existing statute where another reasonable construction of the statute's text is possible). Second, Congress thought the right of interlocutory appeal from injunctions against arbitration is a sufficiently important component of the procedures it devised to give effect to the provisions of Section 2 of the FAA that it took the unusual step of prescribing appellate rights exercisable in state courts.

The vast majority of litigation in this country occurs in the state courts. *Southland,* 465 U.S. at 15. As discussed below, state courts have not generally accepted the idea that Section 16 of the FAA (at least those portions of Section 16 not by their terms applicable only in federal courts) applies to cases pending before them. Given the importance of interlocutory appeals to litigants who seek to preserve and enforce arbitration rights protected by Section 2 of the FAA, the question of whether state appellate courts must hear appeals from interlocutory injunctions against arbitration pursuant to Section 16(a)(2) of the FAA is an important federal question.

B. The Delaware Supreme Court's Refusal Of Bander's Appeal Pursuant To Section 16(a)(2) of the FAA Conflicts With Decisions Of Other State Courts Of Last Resort That Have Recognized Section 16(a)(2)'s Applicability In State Courts.

The Delaware Supreme Court's refusal to recognize, much less give effect to, Bander's right under 9 U.S.C. §16(a)(2) to an interlocutory appeal from the Court of Chancery's injunction against Bander's arbitration resolves an important federal question in a way that conflicts with the decisions of other state courts of last resort. The courts of last resort in the States of Alabama, Mississippi and South Dakota have explicitly recognized, albeit without extensive written analysis, that 9 U.S.C. § 16 applies to state court proceedings. *See Dyre Law Firm, PLLC v. Bradley*, 874 So.2d 984, 986 (Miss. 2004) (permitting appeal pursuant to 9 U.S.C. § 16(a)(2) and (a)(3)); *Riscorp, Inc. v. Occupational Safety Assoc. of Alabama Workmen's Comp. Fund*, 796 So.2d 1062, 1066 (Ala. 2001); *Dakota Wesleyan Univ. v. HPG Int'l, Inc.*, 1997 S.D. 30, ¶7-11, 560 N.W.2d 921, 922-23 (S.D. 1997).[12]

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[12] Intermediate appellate courts in a number of other states have similarly recognized that state court litigants have federally prescribed rights of interlocutory appeal pursuant to 9 U.S.C. §16. *See, e.g., Reis v. Peabody Coal Co.*, 935 S.W.2d 625 (Mo. App. E.D. 1996) (holding that a state court's interlocutory order refusing to stay litigation and compel arbitration was appealable pursuant to 9 U.S.C. §16(a)(1)); *Towles v. United Healthcare Corp.*, 524 S.E.2d 839, 842 (S.C. App. 1999) (finding that a denial of a motion to compel arbitration was "appealable under both federal and state law."). Missouri's Supreme Court very recently noted that it "recognizes the appealability of orders denying arbitration despite the fact that such orders are not final judgments, under the

The Delaware Supreme Court is not alone in its failure/refusal to recognize the applicability of some portions of Section 16 of the FAA to state court proceedings. The courts of last resort in Louisiana and Texas, and arguably in Arizona, have all determined that 9 U.S.C. § 16 is simply inapplicable in state court proceedings. *See, e.g., Collins v. Prudential Ins. Co. of Am.*, 752 So.2d 825, 828-29 (La. 2000) (announcing concurrence with other state court decisions holding that states "are free to follow their own procedural rules regarding appeals, unless those rules undermine the goals" and holding that 9 U.S.C. §16(b) does not control appeals from state court orders compelling arbitration); *Southern California Edison Co. v. Peabody Western Coal. Co.*, 194 Ariz. 47, 52-54, 977 P.2d 769, 774-76 (Ariz. 1999) (holding that the FAA does not require states to follow federal procedural law, and directing the Arizona Court of Appeals to substantively review an interlocutory order staying judicial proceedings and compelling arbitration); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992) (holding that 9 U.S.C. §16 does not apply to state court proceedings, but allowing interlocutory appellate review of orders adverse to arbitration rights pursuant to a writ of mandamus).[13] Georgia and

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influence, if not the command of the provisions of the Federal Arbitration Act . . . ." *Lawrence v. Manor*, No. SC89291, 2009 WL 77897, at *1 n.2 (Mo. Jan. 13, 2009).

[13] It is not practical to determine how many other state courts have concluded that Section 16 of the FAA has no application in their proceedings. Orders dismissing interlocutory appeals from orders adverse to arbitration which (like the Order entered in this

Oregon appellate courts have similarly held Section 16 of the FAA inapplicable to state courts. *See, e.g., American Gen. Fin. Svc. v. Vereen,* 282 Ga. App. 663, 666, 639 S.E.2d 598, 601 (Ga. App. 2007); *Bush v. Paragon Property, Inc.*, 165 Or. App. 700, 705-710, 997 P.2d 882, 886-88 (Or. App. 2000).

Most of the courts that have explained their conclusions that Section 16 of the FAA is inapplicable to state court proceedings have relied upon the substantive versus procedural dichotomy discussed by this Court in *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476-78 (1989) and in *Southland,* 465 U.S. at 16. *See Collins*, 752 So.2d at 828-29; *Peabody Western Coal*, 194 Ariz. at 52-54, 977 P.2d at 774-76; *Jack B. Anglin,* 842 S.W.2d at 272-73. The substantive/procedural dichotomy does not justify such conclusions because it is predicated on a comparison of the "substantive" provisions found at Sections 1 and 2 of the FAA with procedural provisions – Sections 3 and 4 of the FAA – which expressly prescribe procedures to be followed in federal courts. *See Volt,* 489 U.S. at 476-78; *Southland,* 465 U.S. at 16 n.1. The appeal rights prescribed in Section 16 of the FAA were not at issue in *Volt* or in *Southland,* and, unlike Sections 3 and 4 of the FAA, some parts of Section 16 of the FAA – in particular Section 16(a)(2) – are not by their terms linked to proceedings in federal courts. As discussed above, the policy underlying the FAA is frustrated if enforcement of arbitration rights is delayed until after litigation in

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case) make no reference to Section 16 of the FAA or any of its subparts and do not even mention the word "arbitration" are not easily identified as such.

court *on the merits of the dispute the parties agreed to resolve through arbitration* is concluded. And unlike the circumstances in *Volt* (where the FAA had no provision specifically governing how courts should attempt to manage dispute resolution when some, but not all, parties involved in the dispute are bound by an arbitration agreement that one party seeks to enforce) the FAA now has a "specific provision"— i.e., Section 16(a)(2) – to deal with the problem presented by this case: whether an interlocutory injunction against arbitration is appealable.

Oregon's court of appeals took a much different view of the problem in *Bush v. Paragon Property, Inc.*, 165 Or. App. 700, 997 P.2d 882. In earlier decisions, that court had recognized that Section 16 of the FAA applies in state court proceedings and requires state appellate courts to hear interlocutory appeals from orders adverse to arbitration even where, as in Oregon, state law would not otherwise have authorized interlocutory appeals. *Berger Farms v. First Interstate Bank*, 148 Or. App. 33, 939 P.2d 64 (Or. App. 1997); *Wilbur-Ellis Co. v. Hawkins*, 155 Or. App. 554, 964 P.2d 291 (Or. App. 1998). In *Bush*, the Oregon Court of Appeals reversed course. Relying principally on several then recent decisions of this Court addressing states' sovereign immunity, it concluded that the question of whether Congress intended Section 16(a)(2) of the FAA to apply in state courts was immaterial. It held Section 16(a)(2) of the FAA is inapplicable in Oregon courts because Congress is without authority under U.S. Const. Art. I to require state courts to exercise jurisdiction over matters they are not authorized by state law to adjudicate, and, under Oregon law, there are no rights of interlocutory appeal. *Bush*, 165 Or. App. at 706-10, 997 P.2d. at 886-88. Whether or not

the Oregon court's constitutional law analysis is sound or unsound,[14] it would not apply in this case because Delaware's constitution expressly grants the Delaware Supreme Court jurisdiction to hear appeals from interlocutory orders of the Delaware Chancery Court. Del. Const. Art. IV, §11(4). As applicable in this case, Section 16(a)(2) of the FAA does no more than mandate that the Delaware Supreme Court exercise the jurisdiction granted it under state law.

In *Southland*, this Court found it implausible that Congress would rely upon

> the comprehensive powers of the Commerce Clause[] to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted.

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[14] An argument essentially along the lines of the court's reasoning in *Bush* was made and rejected in *VCW, Inc. v. Mutual Risk Mgmt., Ltd.*, 46 S.W. 3d 118, 121 (Mo. App. W.D. 2001). While it may be that the Supremacy Clause must yield to other considerations when a state's sovereign immunity is at issue, such considerations should not come into play when the question is simply the extent of Congress's power to mandate procedures in state courts deemed essential to giving meaningful effect to arbitration rights Congress has determined to protect through the exercise its authority under the Commerce Clause. This Court has previously recognized that federal law may pre-empt even neutral state procedural rules. *Howlett v. Rose*, 496 U.S. 356, 372 (1990). Given the longstanding recognition of the pre-emptive effects of the FAA, *see, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995), the Oregon Court of Appeals' conclusion that Congress was without authority to require state courts to hear interlocutory appeals from orders adverse to arbitration rights is highly suspect.

Southland, 465 U.S. at 15. Given the current split of authority among state courts on the question of whether the rights of interlocutory appeal prescribed in Section 16(a)(2) of the FAA are available when state courts enjoin arbitrations, those rights presently depend upon the particular forum in which a claimed right to arbitrate is attacked. This enables litigants seeking to avoid arbitration to engage in precisely the type of forum shopping this Court found repugnant in *Southland*, 465 U.S. at 15.[15]

This Court should issue a writ of certiorari to the Supreme Court of Delaware so as to resolve the conflict among the state courts of last resort over the applicability of 9 U.S.C. §16(a)(2) in the context of state court proceedings.

C. This Court Has Not Previously Addressed The Important Issue Of Whether Section 16(a)(2) of the FAA Applies In State Courts.

More than twenty years have passed since Congress amended the FAA by adding what is now codified as Section 16 of that statute. During this time, this Court has not addressed whether Section 16 of the FAA is applicable in state courts. The Court made a fleeting reference to the scope of Section 16 in *Digital*

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[15] In this case, for example, if Respondents had sued to enjoin the arbitration in Missouri, where Bander resides, Respondents have their only offices and place of business, and Bander requested the arbitration hearing be held, and a Missouri court had granted a preliminary injunction against the arbitration, Bander's right of interlocutory appeal pursuant to Section 16(a)(2) of the FAA would have been recognized and enforced. *Cf. Lawrence*, 2009 WL 77897 at *1 n.2.

Equip., 511 U.S. at 880 n.7 – a case that presented no issue under the FAA. There, it was noted that Section 16 of the FAA was predicted to have "sweeping impact." *Id.* The narrow reading given the statute by some state courts, however, has necessarily limited its impact.

Given the widely recognized importance interlocutory review of orders adverse to arbitration plays in the legislative scheme to make arbitration rights enforceable in a meaningful way and the explicit text of Section 16(a)(2) of the FAA, the statute can readily be construed to apply in state court proceedings. The Delaware courts have taken a contrary view of the statute's reach, as have the courts in a number of other jurisdictions. This Court should issue its writ of certiorari to the Supreme Court of Delaware in order to resolve conclusively the proper construction and reach of Section 16(a)(2) of the FAA, and particularly the question of whether it requires state appellate courts to substantively review interlocutory injunctions against arbitration.

CONCLUSION

For all of the foregoing reasons, this Court should grant Bander's Petition and issue its writ of certiorari to the Supreme Court of the State of Delaware.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 474, 2008
C.A. No. 3830

[Filed November 3, 2008]

THE BANDER FAMILY PARTNERSHIP, L.P.,

Defendant Below,
Appellant,

v.

TOWERHILL WEALTH MANAGEMENT, LLC, f/k/a CAPITAL PRIVATE WEALTH MANAGEMENT, LLC, TOWERHILL US EQUITIES, LLC, f/k/a NEWPORT NET PERFORMANCE LLC, TOWERHILL LONG/SHORT EQUITY, f/k/a CAPITAL PRIVATE WEALTH STOCK SELECTION LLC and TOWERHILL INTERNATIONAL EQUITIES, LLC, f/k/a CPW INTERNATIONAL EQUITIES, LLC,

Plaintiffs Below,
Appellees.

Court Blow—Court of Chancery of the State of Delaware in and for New Castle County

Submitted: October 16, 2008
Decided: November 3, 2008

Before **STEELE,** Chief Justice, **HOLLAND** and **RIDGELY,** Justices.

ORDER

This 3rd day of November 2008, it appears to the Court that:

(1) Defendant-appellant ("Defendant") has petitioned this Court, pursuant to Supreme Court Rule 42 ("Rule 42"), to accept an appeal from the Court of Chancery's order dated September 8, 2008, which denied Defendant's motion to dismiss and granted plaintiffs-appellees' motion for preliminary injunction. On October 20, 2008, Defendant filed a motion seeking to stay the Court of Chancery's September 8 order. By order dated October 9, 2008, the Court of Chancery denied Defendant's application for certification of the interlocutory appeal and, alternatively, Defendant's motion for stay pending appeal.

(2) Applications for interlocutory review are addressed to the sound discretion of this Court and are granted only in exceptional circumstances. The Court has examined the Court of Chancery's September 8, 2008 order according to the criteria set forth in Rule 42. The Court concludes that exceptional circumstances as would merit interlocutory review of the order do not exist in this case.

NOW, THEREFORE, IT IS HEREBY ORDERED that the interlocutory appeal is REFUSED. The motion to stay is MOOT.

BY THE COURT:

/s/. Myron T. Steele
Chief Justice

APPENDIX B

COURT OF CHANCERY OF THE STATE OF DELAWARE

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: September 29, 2008
Decided: October 9, 2008

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RE: *TowerHill Wealth Management, LLC et al. v. The Bander Family Partnership, L.P., C. A. No. 3830-VCS*

Dear Counsel:

Here are my reasons for denying the defendant's motions for certification of an interlocutory appeal and, alternatively, its motion for stay pending appeal.

I. Background

The underlying dispute in these motions arises from the end of the relationship between the defendant investor, the Bander Family Partnership, L.P., and the plaintiff investment company, TowerHill Wealth Management, LLC, and its various investment LLCs (collectively, "TowerHill"). Their relationship was governed by two sets of contracts: 1) the "Investment Advisory Agreement" between Bander and TowerHill Wealth Management; and 2) the operating agreements of each of the investment LLCs (collectively, the "Operating Agreements").

In November 2007, Bander began the redemption process in accordance with the Operating Agreements, but disputes soon arose. Generally, the Operating Agreements require TowerHill to distribute 90% of the redeemed interest within 30 days of a certain valuation date and to distribute the remaining 10% upon the completion of the next audit. Bander alleges that TowerHill took too long to distribute the funds and should, among other things, be responsible for paying interest. The Investment Advisory Agreement and the Operating Agreements contain different provisions for resolving disputes. The Investment Advisory Agreement calls for arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.[1] The Operating

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[1] Investment Advisory Agreement ¶ 17.

Agreements call for resolution in this court, after the parties first submit to non-binding arbitration or mediation.[2]

Although its complaint in arbitration was framed explicitly and predominantly in terms of the Operating Agreements, Bander initiated arbitration proceedings in St. Louis under the dispute resolution provision of the Investment Advisory Agreement to recover the payments it believes it is owed (the "St. Louis Arbitration"). TowerHill filed suit in this court to enjoin the arbitration and obtain a declaratory judgment that it does not owe interest to Bander. Bander moved to dismiss the action based on lack of personal and subject matter jurisdiction. In my Order of August 22, I denied Bander's motion to dismiss and granted TowerHill's motion to preliminarily enjoin the St. Louis Arbitration. These motions for certification of an interlocutory appeal and for stay pending appeal then followed.

II. Certification Of An Interlocutory Appeal

Bander requests certification of an interlocutory appeal pursuant to Supreme Court Rule 42 from this court's August 22 Order. Bander asserts that the Order presents three issues appropriate for interlocutory appeal: 1) whether the court may exercise personal jurisdiction over Bander; 2) whether the court may determine the substantive arbitrability of the parties' claims; and 3) whether the court may hear TowerHill's claims for declaratory judgment. I

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[2] Operating Agreements §§ 12.8-12.9 or §§ 13.8-13.9, depending on the LLC.

deny Bander's application for certification of an interlocutory appeal because none of these matters meets the requirements set forth in Rule 42.[3]

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[3] Bander also claims, in passing, that it has a right of statutory appeal to the extent that the Order enjoins the arbitration that Bander initiated in St. Louis under both the Delaware Uniform Arbitration Act ("DUAA") and the Federal Arbitration Act ("FAA"). Def.'s Application for Certification of an Interlocutory Appeal at 4. Neither of these statutes is applicable here. The DUAA does not apply because, by its own terms, it is only applicable to agreements "providing for arbitration in this State." 10 *Del. C.* § 5719(a)(2). None of the agreements involved in this dispute call for arbitration in Delaware. Likewise, the provisions of the FAA that Bander relies on here are inapposite. Section 16 of the FAA, which governs the taking of appeals, is a procedural rule directed to the federal courts. Where an action involving an arbitration agreement is brought in state court, "the FAA does not require submission to federal procedural law, and each state is free to apply its own procedural requirements so long as those procedures do not defeat the purposes of the Act." 21 WILLISTON ON CONTRACTS § 57:5 (4th ed.). The purpose of the FAA is to "encourage courts to enforce arbitration clauses in contracts." *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 349 (3d Cir. 1997). Denying an appeal from an order preliminarily enjoining arbitration by applying our state's procedural law does not undermine the enforceability of arbitration agreements. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (stating that a state rule requiring an arbitration to be stayed pending the resolution of related judicial proceedings "determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself"). Moreover, this court's ruling upholding the Operating Agreements' forum selection clauses reflects no anti-arbitration bias violative of the FAA's policies; it reflects the application of ordinary principles of contract interpretation which is all the FAA requires. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (noting that "arbitration is a question of contract" and reaffirming the principle that substantive arbitrability is ordinarily a matter for the court to decide and that parties cannot be required to

"Applications for certification of an interlocutory appeal require the exercise of the trial court's discretion and are granted only in extraordinary or exceptional circumstances."[4] Under the rigorous standard of Rule 42,[5] to be appealable, an interlocutory order must 1) determine a substantial issue, meaning a main question of law related to the merits of the case;[6] 2) establish a legal right, meaning an issue essential to the positions of the parties regarding the merits of the case;[7] and 3) comply with one of the five additional criteria listed in Rule 42(b)(i)-(v).

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submit to arbitration where they have not agreed to it) (internal quotation omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding that when courts interpret arbitration agreements they "should apply ordinary state-law principles that govern the formation of contracts"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) ("States may regulate contracts, including arbitration clauses, under general contract law principles . . . .").

[4] *Sprint Nextel Corp. v. iPCS Inc.*, 2008 WL 2861717, at * 1 (Del. Ch. July 22, 2008) (citing *Ryan v. Gifford*, 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008)).

[5] *See, e.g.*, DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 14.04 (2008) (noting that Rule 42 contains "rigorous criteria" and the Supreme Court requires "strict compliance with Rule 42").

[6] *See Sprint Nextel*, 2008 WL 2861717, at * 1 (citing *Casteldo v. Pittsburgh Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973)).

[7] *See Sprint Nextel*, 2008 WL 2861717, at * 1; *In re Kent County Adequate Public Facilities Ordinances Litig.*, 2007 WL 2875204, at *2 (Del. Ch. Sept. 26, 2007).

A. Personal Jurisdiction

Bander attempts to establish the substantial issue prong for the personal jurisdiction question through its unsupported statement that "[f]ew, if any, issues can be more substantial than those of the Court's jurisdiction over the defendant."[8] It offers even less reasoning for the legal right prong of Rule 42 other than observing that the Order determines TowerHill's right to bring Bander before this court. Although these may be linguistically permissible uses of the phrases "substantial issue" and "legal right," they fall short of the meaning given to them by our Supreme Court.

Both the substantial issue and legal right prongs of Rule 42 have been interpreted as requiring a matter that goes to the merits of the case.[9] An exercise of personal jurisdiction does not affect the merits of TowerHill's claims against Bander.[10] The Supreme Court has recognized this by repeatedly holding that

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[8] Def.'s Application for Certification of an Interlocutory Appeal at 10.

[9] *See, e.g., Sprint Nextel*, 2008 WL 2861717, at *1 ("The 'substantial issue' requirement is met when an interlocutory order decides a main question of law *which relates to the merits of the case*, and not to collateral matters.") (emphasis added); *Kent County*, 2007 WL 2875204, at *2 ("[A] legal right is established where the Court determines an issue essential to the position of the parties *regarding the merits of the case.*") (internal quotation omitted) (emphasis added).

[10] *See, e.g.*, WOLFF & PITTENGER at § 14.04(b) (noting that "a legal right generally is not established where either party may yet prevail at trial"). Here, nothing in the Order has altered Bander's likelihood of success on the merits of the claims.

a denial of a motion to dismiss for lack of personal jurisdiction does not establish a legal right or determine a substantial issue.[11]

Because Bander has not established that the personal jurisdiction issue creates a substantial issue or legal right, I need not address whether any of the criteria listed in Rule 42(b)(i)-(v) are met.

B. Substantive Arbitrability

Bander's arguments as to why determinations of arbitrability establish a substantial issue and legal right are essentially identical to their personal jurisdiction arguments and are also not persuasive. Again, the issue of whether TowerHill's claims should be heard in arbitration or this court does not go to the actual merits of those claims. And again, the Supreme Court has repeatedly denied attempts to appeal from unfavorable rulings on arbitrability.[12]

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[11] *Jelin v. NRG Barriers, Inc.*, 6°2 A.2d 626 (Del. 1996); *Tortuga Cas. Co. v. Nat'l Union Fire Ins. Co. Of Pittsburgh, Pa.*, 604 A.2d 419 (Del. 1991). The Supreme Court recently upheld this principle in *Olivieri v. Aveta, Inc.*, 2008 WL 4216352, at * 1 (Del. Sept. 16, 2008).

[12] *See Tortuga*, 604 A.2d at 419 (noting that an order determining an arbitration clause was not applicable did not "establish a legal right, as that term has been interpreted"); *Parker v. Dep't of Corr.*, 670 A.2d 1340 (Del. 1995) (noting that an appeal from a grant of a motion to bypass arbitration did not meet the requirements of Rule 42). In a factually similar case involving interpretation of a contractual ADR clause, *Cantor Fitzgerald, L.P. v. Prebon Securities (USA) Inc* , 731 A.2d 823 (Del. Ch. 1999), this court, through then-Vice Chancellor, now Chief Justice, Steele determined that a plaintiff did not fall within the scope of the

As with the personal jurisdiction issue, because two of the prongs of Rule 42(b) have not been satisfied, I need not consider the third, the applicability of subsections (i)-(v) of Rule 42.

C. Declaratory Judgment

Bander's argument that this court does not have subject matter jurisdiction to hear TowerHill's claims for declaratory judgment is an attempt to create an appealable issue where there is none. Even if I assume, for the sake of argument, that the question of whether the court has subject matter jurisdiction over the underlying claim establishes a substantial issue or legal right, Bander has not controverted this court's jurisdiction or met any of the other criteria listed in Rule 42(b)(i)-(v).

1. Controverted Jurisdiction

Bander asserts that because the interest payments that are central to the underlying dispute have already been withheld by TowerHill, TowerHill's claim for a declaration that it owes no interest payment seeks exculpatory rather than prospective relief, in violation

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NASD Rules' mandatory arbitration provision and allowed its claims to proceed in this court. In denying the defendant's subsequent application for interlocutory appeal on this issue, the court noted that the application fell "within the general class of purported appeals . . . which rarely establish a legal right and are therefore unappealable." *Cantor Fitzgerald*, 1999 WL 135241, at *2 (Del. Ch. Feb. 25, 1999) (citing *Tortuga*).

of the teaching of *Hampson*.[13] This argument ignores the nature of the relief that TowerHill seeks, which is certainty that it will not have to make payments in the future that it does not believe it owes. Precisely because TowerHill has not yet made any interest payments, any harm to it flowing from the interest payments must come in the future. I note also that, had Bander originally filed its claim for the interest payments in this court as it was supposed to under the Operating Agreements, TowerHill would have had no argument to say that this court does not have subject matter jurisdiction. The fact that Bander's actions caused TowerHill to be the first party to file in this forum, forcing the procedural posture of a declaratory judgment, does not change this court's competence to determine the merits of the controversy.

In that respect, it is plain that this court has statutory jurisdiction over TowerHill's claims because they arise from the Operating Agreements of TowerHill's Delaware-incorporated investment LLCs. Delaware's Limited Liability Company Act provides that "[a]ny action to interpret, apply or enforce the provisions of a limited liability company agreement . . . may be brought in the Court of Chancery."[14]

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[13] *Hampson v. State ex rel. Buckson*, 233 A.2d 155, 156 (Del. 1967) ("[D]eclaratory judgment actions [are] intended to provide a remedy where no other remedy is available under circumstances where an impending injury has not as yet occurred.").

[14] 6 *Del. C.* § 18-111. The provision states in full that:

> Any action to interpret, apply or enforce the provisions of a limited liability company agreement, or the duties, obligations or liabilities of a limited liability company to the members or managers of the limited liability

This court also has equitable jurisdiction because TowerHill sought and obtained an injunction. There is a concrete dispute under the Operating Agreements subject to a choice of forum clause calling for adjudication in this court. Because this court's equitable jurisdiction has been invoked, this court can also decide the remaining claims under the clean-up doctrine, irrespective of its clear statutory authority.[15]

2. Termination Of Litigation

Appellate review will not terminate the litigation. No matter what the outcome of a review of the Order, this litigation will continue in one forum or another because the parties have a genuine dispute as to the interest payments and other issues.

3. Otherwise Serve The Interests Of Justice

Appellate review will not, in my view, otherwise serve the interests of justice. Bander knew when it

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company, or the duties, obligations or liabilities among members or managers and of members or managers to the limited liability company, or the rights or powers of, or restrictions on, the limited liability company, members or managers, may be brought in the Court of Chancery.

[15] *See Tull v. Turek*, 147 A.2d 658,664 (Del. 1958) ("[A] generally accepted principle of equity jurisprudence [is] that once equity has acquired jurisdiction of a cause, it will retain that jurisdiction to give final relief to end the controversy); WOLFE & PITTENGER at § 2.04, 2-78 ("[W]here appropriate, the court may assert jurisdiction over any legal matters properly arising during the course of the litigation if the assertion of such jurisdiction will further the goal of rendering full and final relief as to all aspects of the controversy.").

signed the Operating Agreements that some disputes arising out of its relationship with TowerHill would come to this court, if non-binding arbitration or mediation failed, rather than going to binding arbitration. Bander cannot now complain that its arbitration rights are being trampled simply because the clear contracts it signed are being enforced.[16]

In its complaint in arbitration, Bander repeatedly accused TowerHill of violating the Operating Agreements, which call for adjudication in this court. It is only the dispute resolution clause in the separate Investment Advisory Agreement that provides for binding arbitration in accordance with the rules of the American Arbitration Association.[17] Thus, the argument that this case falls under *Willie Gary*[18] is plainly without force. *Willie Gary* only called for substantive arbitrability to be determined by an arbitrator "it applies in those cases where the arbitration clause *generally provides for arbitration of all disputes* and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability."[19] Here, where there are various dispute resolution clauses in play in various contracts, it is

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[16] *CJ Monsanto Co. v. Aetna Cas. & Sur. Co.*, 577 A.2d 754 (Del. 1990) (stating, on a denial for interlocutory review, "[w]e similarly see no reason why considerations of justice compel us to grant Monsanto the unilateral and unfettered right to shop forums for substantive law").

[17] Investment Advisory Agreement ¶ 17.

[18] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006) (emphasis added).

[19] *Id.* at 80.

impossible to select one and say it applies generally to all disputes. Moreover, Bander's complaint in arbitration – by its own words – arises primarily from and seeks relief for breach of the Operating Agreements, contracts which call for *binding* dispute resolution to take place *in this court*, not in arbitration.

Bander has not asserted any other grounds for establishing one of the criteria listed in Rule 42(b)(i)-(v). Accordingly, Bander has failed to meet the requirements of Rule 42 on the issue of this court's jurisdiction to hear TowerHill's claim for declaratory judgment.

III. Motion To Stay Pending Appeal

Bander also seeks a stay pending appeal, which I address for completeness' sake only. In the event that the Supreme Court accepts an interlocutory appeal, it is, of course, free to stay this matter, but I, for my part, am unpersuaded that a stay is warranted. The granting of a motion to stay pending appeal is discretionary,[20] and I apply the relevant factors articulated by the Supreme Court: (1) likelihood of

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[20] Supr. Ct. R. 32(a). Bander's attempts to use the stay provisions of the DUAA and FAA are not well-taken. For the reasons noted earlier, neither statute is applicable in this case. *See supra* note 3. Moreover, the policy rationale behind the stay provisions – to respect "the parties' preference for non-judicial dispute resolution," *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997) – would not be vindicated here, where the parties executed an agreement reflecting the fact that they did not intend to have all of their potential disputes submitted to binding arbitration.

success on the merits of the appeal; (2) whether the petitioner will suffer irreparable injury if the stay is not granted; whether any other interested party will suffer substantial harm if the stay is granted; and (4) whether the public interest will be harmed if the stay is granted.[21]

Bander is unlikely to succeed on the merits. Bander's complaint in arbitration rests almost entirely on provisions of the Operating Agreements, which clearly call for litigation in this court if the initial non-binding arbitration or mediation procedure specified in the Operating Agreements fails.

I am also not convinced that Bander will be harmed by being forced to litigate in a forum that it freely agreed to. I am therefore disinclined to allow Bander to protract these proceedings any further, and thus deny their motion for a stay pending appeal.

* * *

For all these reasons, the defendant's motions for certification of an interlocutory appeal and stay pending appeal are DENIED.

IT IS SO ORDERED.

Very truly yours,

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[21] *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm'n*, 741 A.2d 356, 357 (Del. 1998).

/s/ Leo E. *Strine, Jr.*

Vice Chancellor

cc: Harry B. Wilson, Esquire
R. Prescott Sifton, Jr., Esquire
Kenton E. Knickmeyer, Esquire

APPENDIX C

GRANTED **EFiled: Sep 8 2008 2:31PM EDT**
Transaction ID 21400683
Case No. 3830-VCS

COURT OF CHANCERY
STATE OF DELAWARE

C.A. No. 3830-VCS

[Filed September 8, 2008]

TOWERHILL WEALTH MANAGEMENT LLC, f/k/a CAPITAL PRIVATE WEALTH MANAGEMENT, LLC, et al.,	)
Plaintiffs,	)
vs.	)
THE BANDER FAMILY PARTNERSHIP, LP,	)
Defendant.	)

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND GRANTING PLAINTIFFS' MOTION FOR PRELMINARY INJUNCTION

WHEREAS, the Court having heard and considered (i) the parties' written submissions in connection with Defendant's Motion to Dismiss (the "Motion to

Dismiss") and Plaintiffs' Motion for Preliminary Injunction (the "Preliminary Injunction Motion"), and (ii) the arguments presented by the parties on said motions at a hearing on August 22, 2008 (the "Hearing"),

For the reasons stated on the record at the Hearing, IT IS HEREBY ORDERED, this _____ day of _____ 2008, as follows:

1. Defendant's Motion to Dismiss is DENIED;

2. Plaintiffs' Preliminary Injunction Motion is GRANTED;

3. Defendant is hereby preliminarily enjoined and prohibited from:

   a. Proceeding further with the binding arbitration proceedings it has initiated in St. Louis, Missouri, including but not limited to making any amendments to its pending AAA arbitration demand;

   b. Initiating any new legal action or arbitration in connection with the parties' disputes over the redemption of defendant's membership interests in plaintiffs' investment funds, including but not limited to any action or arbitration seeking the recovery of any funds currently being withheld by plaintiffs as a reserve against legal fees and expenses.

4. Plaintiffs shall not be required to post bond in connection with the preliminary injunction entered pursuant to this Order.

SO ORDERED:

Vice Chancellor Leo E. Strine, Jr.

This document constitutes a ruling of the court and should be treated as such.	
Court:	DE Court of Chancery Civil Action
Judge:	Leo E Strine
File & Serve Transaction ID:	21391434
Current Date:	Sep 08, 2008
Case Number:	3830-VCS
Case Name:	CONF ORD ON EXHS TO COMPL AND MOT PREL INJ TowerHill Wealth Management LLC et al vs The Bander Family Partnership LP
/s/ Judge Leo E Strine	

APPENDIX D

COURT OF CHANCERY JUDICIAL ACTION FORM

Date: August 22, 2008 CA: 3830-VCS

☐ CHANCELLOR WILLIAM B. CHANDLER
☐ VICE CHANCELLOR DONALD F. PARSONS, JR.
☐ VICE CHANCELLOR STEPHEN P. LAMB
☐ MASTER SAM GLASSCOCK III
☑ VICE CHANCELLOR LEO E. STRINE, JR.
☐ MASTER KIM AYVAZIAN
☐ VICE CHANCELLOR JOHN W. NOBLE

PLAINTIFF: Tower Hill Wealth Management LLC et al

DEFENDANT: The Bander Family Partnership LP

NATURE OF PROCEEDING

TEMPORARY RESTRAINING ORDER ___
TRIAL ___
MOTION TO DISMISS ___
PRELIMINARY INJ. ✓
OTHER Motion to Dismiss

DECISION BY COURT: ✓ RESERVED: ___

The Courts decision is to Grant the Preliminary Injunction. Motion to Dismiss is Denied as ruled on the record.

BRIEFING SCHEDULE

OPENING DUE: ____ ANSWERING DUE: ____
REPLY DUE: ____

CLERK: /s/_____

STARTING TIME 1:35pm

ENDING TIME 2:45pm

/s/_____
CHANCELLOR

Plaintiff(s) Attorney:
Richard I.G. Jones, Esq.
Harry B. Wilson, Jr. Esq.
Lauren E. Maguire, Esq.

Defendant(s) Attorney:
Kent Knickmeyer, Esq.
Daniel A. Dresbach

Court Reporters

William Dawson ☐
Diane McGrellis ☑
Jennie Washington
Maureen McCaffery ☐
Neith Ecker ☐

APPENDIX E

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Civil Action No. 3830-VCS

TOWERHILL WEALTH MANAGEMENT f/k/a CAPITAL PRIVATE WEALTH MANAGEMENT, LLC, TOWERHILL US EQUITIES, LLC, f/k/a NEWPORT NET PERFORMANCE LLC, TOWERHILL LONG/SHORT EQUITY, f/k/a CAPITAL PRIVATE WEALTH STOCK SELECTION LLC and TOWERHILL INTERNATIONAL EQUITIES, LLC, f/k/a CPW INTERNATIONAL EQUITIES, LLC	)
Plaintiffs,	)
vs.	)
THE BANDER FAMILY PARTNERSHIP, L.P.	)
Defendant.	)

Chancery Courtroom No. 12A
New Castle County Courthouse
Wilmington, Delaware
Friday, August 22, 2008
1:35 p.m.

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

ORAL ARGUMENT AND THE COURT'S RULING

CHANCERY COURT REPORTERS
500 North King Street – Suite 11400
Wilmington, Delaware 19801-3759
(302) 255-0525

[p.2]

APPEARANCES:

RICHARD I.G. JONES, ESQ.
LAUREN E. MAGUIRE, ESQ.
Ashby & Geddes
-and
HARRY B. WILSON, ESQ.
of the Missouri Bar
Husch Blackwell Sanders LLP
For Plaintiffs

DANIEL A. DREISBACH, ESQ.
Richards, Layton & Finger, P.A.
-and-
KENTON E. KNICKMEYER, ESQ.
of the Missouri Bar
Thompson Coburn LLP
For Defendant

- - -

[p.3]

MR. DREISBACH: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. DREISBACH: I just rise for introductions. With me closest is Kent Knickmeyer of the Thompson Coburn law firm in St. Louis, and Dr. Stephen Bander.

THE COURT: Welcome.

MR. JONES: Good afternoon, Your Honor. Richard Jones for plaintiffs. And with me this afternoon is Harry Wilson of Husch Blackwell Sanders, and my associate Lauren Maguire. Then, at the back of the room, we have Rocky Kroeger, who is the president of TowerHill Wealth Management, and Torie Figura, who is the CFO of all the three plaintiffs.

THE COURT: I want everybody -- everybody be mindful. I'll give you each 15 minutes. There's a lot of papers here, and it's really not -- the issues, despite all the papers, are fairly discrete.

MR. JONES: Your Honor, one thing I want to quickly dispense with. We notified the Court last night, or yesterday afternoon, that the motion

[p.4]

for commission had been dealt with.

We've agreed to give -- our clients will give Bander all of the documents in its possession that we think that they're looking for, and will assist them to try to

get whatever else they need from US Bank. And then they're reserving their right to come back if they're not satisfied with what they get. I think that dispenses with the motion for commission.

MR. DREISBACH: Yes, Your Honor.

MR. JONES: Given the limited amount of time I've got, Your Honor, if it's okay, I'll just skip the facts. I suspect Your Honor's familiar with them. Is that okay?

THE COURT: Um-hum.

MR. JONES: You're right. There are a lot of issues raised. I'll start with the motion to dismiss. There are a lot of issues raised on the motion to dismiss. But I think they boil down to a few narrow issues, and that those three issues -- those narrow issues are answered by three facts which I think are beyond dispute: that's, first, that Bander consented to a service of process mechanism in the operating agreement; second, that Bander consented in

[p.5]

the operating agreements to Delaware jurisdiction; and, third, that all Bander's claims in the arbitration -- the AAA arbitration -- arise out of or relate to the operating agreements and not the investment advisor agreements. And then we think those facts are dispositive of all Bander's arguments on the motion to dismiss, and we also think they should result in the granting of our PI.

On the motion to dismiss, the first argument Bander raises is that it wasn't properly served. We served Bander through two different mechanisms. The first was 17-911 of the LLC Act, and the second was Sections 12.8 and 13.8 of the operating agreements. Section 17-911 was for service of process on foreign partnerships that are doing business in the State of Delaware. I don't think there's any dispute that we followed the proper procedures under 17-911, but instead Bander argues that it wasn't doing business in Delaware.

THE COURT: Was it doing business in Delaware?

MR. JONES: Yes, it was. Under Alstom Power, it did business when it consented to Delaware jurisdiction. That also satisfies minimum

[p.6]

contacts under Alstom Power. And I think that, to the extent Your Honor wants me to go through them, the arguments --

THE COURT: Would it satisfy it under Austin Powers?

MR. JONES: I'm not familiar with that authority, Your Honor.

I think Bander's main argument -- that is, it only consented to jurisdiction when it was a member --

THE COURT: Yeah, it's former member.

MR. JONES: Now it's a former member. I think the act of consenting to jurisdiction is the doing business. It's a single act jurisdictional statute or service statute. It tripped that wire. Can't take it back. Setting aside there are other reasons it's pursuing rights as a member --

THE COURT: As a departing member; right?

MR. JONES: Well, right. I guess there's --

THE COURT: That's the contractual term. A departing member.

MR. JONES: Right. But I think that,

[p.7]

as it consented to jurisdiction and service for all disputes arising out of the operating agreement, this is clearly a dispute arising out of the operating agreement. So we think that suffices both for the service of process under 17-911 and Sections 12.8 and 13.8. So I don't think that that argument gets them there. They were properly served.

The next argument -- that is, we were obligated to first commence nonbinding arbitration or a mediation before coming to this court even to seek an injunction. Mediation -- nonbinding arbitration and mediation is not an effective remedy to stop Bander's wrongful --

THE COURT: I'm assuming you would be happy to initiate it, but the first order of business was to make sure that the AAA arbitration was stopped?

MR. JONES: That's correct, Your Honor. We cite a lot of cases where the Court does issue injunctive relief in that context.

They also say TowerHill lacks standing to bring the action. They don't contest the standing of the other three plaintiffs, but they say TowerHill lacks standing.

TowerHill has a contract right, as a

[p.8]

manager of the three investment LLCs, to nonbinding arbitration and mediation. It's being deprived of that right, and it has standing to come into this court and seek injunctive relief to stop the deprivation of that contract right.

They also attack Counts I and II of our complaint, which are our prayers for declaratory judgment. They say that Count I, which seeks a declaration that Bander's not entitled to interest on his distributions, they say that doesn't seek prospective relief But in the arbitration they're claiming entitlement to interest. That's unsupported by any provision in the operating agreements.

In fact, the operating agreements unambiguously provide that Bander is not entitled to interest. If I could, with the Court's permission, I've got an excerpt at Section 3.4 that I would like to hand up.

THE COURT: Thank you. This is the CPW International Equities LLC operating agreement?

MR. JONES: I think that's right, Your Honor. This is -- this same provision, Section 3.4, appears in each of the operating agreements. And it says, "No member shall be entitled to withdraw any

[p.9]

part of its capital contribution, to receive interest or other earnings on its capital contribution or to receive any distributions from the company, except as expressly provided in this agreement."

I think that pretty much takes care of their right to the interest they're seeking in the arbitration. I think that will be clear, if once we get to mediation and then on to this court.

THE COURT: In either instance, what you're saying is, there's a litigable dispute and your reading of the dispute resolution clause has to be that, if the nonbinding ADR procedure doesn't work, then it has to be adjudicated here?

MR. JONES: That's correct, Your Honor. And I think the provision, like this, may maybe explains why Bander is not willing to proceed under the operating agreements. But we seek preventative justice. And that's the point. That we seek to prevent the assertion of the right when it's contrary to the agreements. I think that qualifies us for declaratory judgment on that point.

On the argument as to Count II, we contend Bander's pursuit of binding arbitration is an ongoing breach of the operating agreement. Count II

[p.10]

seeks a declaration of that effect. And I think that's also a proper subject for declaratory relief, particularly with the Court's subject matter jurisdiction under the LLC Act to interpret the rights and obligations of members of LLCs, or to interpret the rights and obligations under operating agreements.

I think that brings us to the issue of whether the Court can decide substantive arbitrability. I think Willie Gary is pretty dispositive here. The normal rule is the court does decide substantive arbitrability and the arbitrators only decide, where the parties are unambiguously provided, that all claims will be submitted to arbitration.

I think that's clearly not the case here. We have competing dispute resolution provisions. It can't be said that the parties unambiguously provided for nonbinding arbitration. And in this instance it's up to the Court -- the Court has subject matter jurisdiction over substantive arbitrability. And so that also is not grounds for dismissal. I think that takes care of all their dismissal arguments. And for the reasons I've just stated, we would respectfully request that the Court

[p.11]

deny the motion to dismiss.

Turning to the PI motion. In order to show our entitlement to injunctive relief, plaintiffs are required to show a reasonable probability of success. And in this case that means that Bander has improperly

submitted claims to binding arbitration, a threat of irreparable harm, balancing the hardships that weighs in our favor.

On the probability of success prong, Bander should have submitted this dispute to nonbinding arbitration and mediation. All of Bander's arbitration claims are dependent on the provisions of the operating agreement. By contrast, I don't think Bander can legitimately tie any of its claims, as they're now framed, to the investment advisory agreement.

They have tried to argue that TowerHill took possession of its funds. That's an effort to slide the dispute under the side letter, which I think Your Honor is familiar with, that talks about theft and misappropriation, and then it funnels back into the investment advisory agreement. The premise -- the factual premise is against the weight of all the evidence. We submitted now three

[p.12]

affidavits. I think only two of them go to that point.

The last argument we had was what we heard from Bander was that these wire confirmations -- I don't know if Your Honor has had a chance to look at the wire confirmations. I've got copies of those.

Would it be helpful to see them?

THE COURT: Sure. I love a good wire confirmation on a Friday. Certainly a good way to cap off a week. It's nice when you see it coming into you.

MR. JONES: If you look at the first page -- and there are pretty much to this effect -- the first page under Exhibit C. On the left column there's a dark line running down the middle of the page. Right above that on the left column it says, "Originator, TowerHill Wealth Management." And across from that, in the right column it says, "Originator FI," and there's an account number.

Now, Bander has looked at this and said that proves, despite our affidavits, that TowerHill has a bank account at US Bank, and they're lying, and then that's where the funds came from.

We went to US Bank. We said, "What's

[p.13]

in this account number?" US Bank said, "This is a trust account that we use. What we do is, we take money from the investment LLCs, put it in the trust account, shoot out the wires." Every one of these has that account number. It is not an account for TowerHill Wealth Management. We're going to give these guys bank documents that they sought in the commission. They're going to find that out. I think that kind of puts the nail in the coffin of the theft or misappropriation.

THE COURT: I take it your bigger point, anyway, is their complaint in arbitration is almost entirely grounded in these operating agreements and the capital return provisions under them?

MR. JONES: That's right, Your Honor, and the interest provisions. And there are some other provisions. Yes.

THE COURT: The point is, they took the Bander partnership, took its money out of various investment funds and it's seeking in its view it's contractual rights that the return of those funds was not honored. The contractual rights are the rights in the operating agreements of those LLCs.

MR. JONES: That's right, Your Honor.

[p.14]

That's right.

THE COURT: And it has not withdrawn that pleading, I think.

MR. JONES: That's right. Your Honor, it's still live.

Let me just go to irreparable harm. I think we're pretty clear there, too. Parfi Holdings, Qwest Communications, KL Golf, Brown versus T-Ink are all clear: we face irreparable harm by being forced into arbitration that we didn't contract for. That's the situation here. It's cut and dry, as far as I can tell, that we face irreparable harm.

Bander says, "Well, you don't really," because he can go back and go through some federal statutes and maybe undo the arbitrator's award. I think that misses the point in the way of Delaware authority. And I think Qwest explains it best. The irreparable harm

comes from a loss of an important contract right, the right to arbitration. And subsequent litigation doesn't restore that contract right once it's been violated.

On balancing the hardships, I'd submit that Bander faces no hardship by being required to resolve disputes in the manner they agreed to do. I

[p.15]

think there's some things here that Your Honor asked, in terms of a scheduling conference, what's going on here. I can't answer that question. There's probably people in the courtroom that can. But I can't.

What I do know is that -- or I understand -- is that the St. Louis firm that's representing the Bander partnership here also represents the manager -- the former managers that have left TowerHill and also represents their new fund. That's one thing.

Another thing I know is that TowerHill was subject to an SEC audit last year, which is a normal thing. It comes about every five years. Well, lo and behold, in the beginning of 2008, SEC came back and they wanted to see a lot of documents relating to the Banders. We're under attack here. I think -- I don't know why exactly, but I think we are. And I think that weighs into the balancing of the hardships, when you see what we're going to do here.

I don't think we face -- I think we face hardship by being deprived of our contract right, and there's also a public interest favoring the upholding of parties dispute resolution mechanisms. So I think, on balancing the hardships, this tilts

[p.16]

pretty heavily in our favor.

And lastly, I just want to make clear the scope of the injunctive relief we're seeking. First, we ask the Court to ban Bander entirely from pursuing any binding arbitration. I think we've shown that the operating agreements are the origin of the entire dispute. And Parfi Holdings says that, to proceed with arbitration, the parties have to show that its claims flow from the contract that contains the arbitration provision. And so I think Parfi actually uses the word "touches on." Anything that touches on the operating agreement -- I think Your Honor mentioned this in the scheduling conference -- that's not proper grounds for binding arbitration. Bander hasn't met that burden. I don't think it can -- certainly on the claims as presently claimed -- and it should be enjoined entirely from pursuing arbitration.

I can see where the Court may look at it and say, "Well, there could be some claims that could be pursued hypothetically." To the extent that Your Honor's inclined to think that, what we would ask is that the Court require Bander to come back to court, in the event that it decides to pursue binding

[p.17]

arbitration, and show us their contemplated arbitration demand. I think that would stop us from having to come back in here and seek expedited relief and injunctive relief, solve the Court from having to deal with that on a shortened basis, and it would also prevent the arbitrators from having to interpret this

Court's injunction and not maybe understand the full import of it.

Lastly, recently Bander threatened to sue TowerHill in yet another action. This one on the withholding of the 1 million-dollar litigation reserve. And it threatened to do it in Illinois state court under the side letter, because it's a theft, according to them.

THE COURT: A theft?

MR. JONES: Well, I think that's going to be their theory. They didn't actually say that. I don't want to put words in their mouth. To the extent they're suing under this side letter, there needs to be a theft, misappropriation. So that's what I would assume they would argue.

We've withheld that money under the operating agreement. Again, that dispute arises under the operating agreement. And we would ask that any

[p.18]

injunction also prevent them from filing that suit and rather have it be submitted to a nonbinding arbitration mediation.

That's it, Your Honor. I'll sit down.

THE COURT: Thank you, Mr. Jones.

MR. KNICKMEYER: Your Honor, Kent Knickmeyer with Thompson Coburn of St. Louis on behalf of the defendant, The Bander Family Partnership.

I would like to start with the scope of the injunction that Mr. Jones just referred to because, as I heard him, it's different from the scope of the injunction that's requested in the supplemental -- I think it's the second supplement to the motion for preliminary injunction. The Court is probably aware that the plaintiffs have filed an amended complaint and that, at about that time, they also supplemented their motion for preliminary injunction. And in that motion they asked the Court to enter a mandatory injunction compelling the partnership to go to nonbinding arbitration.

Mr. Jones didn't mention that here. I suspect that the reason is because they have realized that's something that's beyond the Court's power,

[p.19]

under both the Uniform Arbitration Act, as enforced in Delaware right now, and under the Federal Arbitration Act. Although Section 4 only applies to federal courts.

The only courts that are authorized to enter orders to compel arbitration are courts sitting in the jurisdiction where the arbitration agreement sought to be enforced --

THE COURT: Well, that's fine. I believe it was you all who said, you know, you got to get a nonbinding arbitration first under the operating agreements.

MR. KNICKMEYER: I did say that, Your Honor.

THE COURT: If you choose not to do that -- if I were to conclude that a preliminary injunction is in order and you choose not to go to nonbinding arbitration, that's your choice. You'll end up back here.

MR. KNICKMEYER: I appreciate that, Your Honor. The point is, we've never been asked to go to nonbinding arbitration under the provisions of this agreement -- these agreements.

THE COURT: Under what authority does

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a non-- does an arbitrator over a nonbinding proceeding have to stop another arbitration proceeding?

MR. KNICKMEYER: I don't think it has the authority to stop --

THE COURT: Let's move on to other issues.

MR. KNICKMEYER: The questions before the Court, as we see them, Your Honor, are primarily, first, sufficiency of service of process; second, personal jurisdiction over the partnership; third, subject --

THE COURT: Same issue -- the first two -- right?

MR. KNICKMEYER: They are substantially the same issue. But as the plaintiffs have presented it, they're slightly different. As I understand their arguments, they would contend that they can effect sufficient service of process under the Delaware statute that was referred to -- 17-911 -- even if there

isn't personal jurisdiction. The personal jurisdiction issue would arise later. All they have to establish for service is -- according to their arguments -- is that it's a foreign jurisdiction

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not present in Delaware, not qualified to do business in Delaware.

Be that as it may, the point of all of this is that the only hook that the plaintiffs cite for asserting jurisdiction, or serving process over the partnership, is the provisions of these operating agreements which provide that there is consent by members to jurisdiction and a certain form of service of process; but notwithstanding that provision, that the parties will first go to nonbinding arbitration or mediation and those remedies will be exhausted.

The plaintiffs have never asked, other than in this motion, that they can't properly present to this Court because this Court doesn't have authority to order arbitration in St. Louis or in California, which are the venues specified in these operating agreements. Until they filed that motion, there was never any request by the plaintiffs that my client participate in nonbinding arbitration, or mediation, in accordance with the operating agreement.

THE COURT: Is that what your client desires?

MR. KNICKMEYER: My client desires to enforce its right against

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TowerHill Wealth Management -- one of the plaintiffs, not all three -- to arbitrate disputes under the investment advisory agreement. That's what we've attempted to do.

THE COURT: The answer is, your client does not desire nonbinding arbitration under the operating agreement?

MR. KNICKMEYER: We've never asked for that, Your Honor.

THE COURT: So your client therefore does not desire it?

MR. KNICKMEYER: No, Your Honor, that's not what I said. I said we've never asked for it and the other side has never asked for it. And if and when that request is made, then we'll cross that bridge when it comes. But at this point in time, there's no bridge to cross because the request has never been made.

THE COURT: Okay. Let's move on.

MR. KNICKMEYER: Without having gone through that step first, you can't trigger the consent, if the consent were still available to the plaintiffs. It isn't. And it's not available because, under the terms of the agreements drafted by

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the plaintiffs, the consent only subsists while somebody is a member. That's what the clauses say: members consent.

Plaintiffs have asserted repeatedly that the partnership is a former member and, as a former member, the partnership is not consenting. It is not obliged to consent under the terms of this agreement. It is now not an investor of capital in these investment LLCs; it is rather a creditor. That point has also been made by the plaintiff. And for that reason, Section 3.4 that Mr. Jones pointed the Court to doesn't apply, because we're no longer talking about money that is partnership capital. We're now talking -- excuse me, LLC capital. We're now talking about money that has become a debt of the LLC to the partnership. And this says nothing about paying interest on debts of the LLC. We aren't there. We've got a former member. The former member has rights as a creditor. It does not have obligations as a member at this point.

Turning to the larger question before the Court; that is, subject matter jurisdiction over the arbitrability. We have a separate and distinct agreement -- an investment advisory agreement between

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TowerHill Wealth Management and the partnership. None of the three investment LLCs are parties to that agreement. None of those three investment LLCs are named as parties in the arbitration. They don't have a basis to come to this Court and say, "We are being

irreparably harmed by the partnership's invocation of its rights against the investment manager -- the investment advisor."

It happens that the investment advisor is also the manager of these investment LLCs. And in the course of its duties as an investment manager, it was using its authority, as the manager of the LLCs, to carry out its investment advisory duties to the partnership.

If you look at the investment advisory agreement, it is very clear. It identifies the investment advisor, TowerHill Wealth Management, the partnership, as the advisee. It says TowerHill Wealth Management will advise the advisee about how to invest the money, and it will manage it.

One of the mechanisms for managing is to invest the money through any of a series of these limited liability companies. Each of these three limited liability companies that are now plaintiffs

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before the Court -- TowerHill, Long/Short, TowerHill US Equities and TowerHill International Equities -- are listed under their former names in the investment advisory agreement. And in effect, what that investment advisory agreement says is that, among other things, TowerHill Wealth Management will manage the partnership's money in accordance with the provisions of those operating agreements of those particular LLCs into which the Banders' money is ultimately invested.

What that does, in effect, is bring the operating agreements into the ambit of the arbitration clause of the investment advisory agreement, insofar as it represents a promise by TowerHill Wealth Management to the partnership that it is going to manage and handle the partnership's money in accordance with those operating agreements.

In that respect, it is very analogous to what we have to address in regard to who has the authority to deal with the question of arbitrability, or substantive subject matter jurisdiction over the question of what can be arbitrated pursuant to the arbitration clause of the investment advisory agreement, and what can't be arbitrated pursuant to

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that clause.

Just as the investment advisory agreement makes reference to these investment LLCs and says the manager, or the advisor, will manage the money in accordance with those, it also says, if the parties have a dispute, they're going to resolve that dispute in accordance with the AAA commercial arbitration rules. It doesn't spell out the AAA commercial arbitration rules. But those, much like the operating agreement obligations of the investment advisor as manager, become part of the party's contract.

And so, when the parties are seen to have referenced the AAA commercial arbitration rules, as they did in this agreement, Delaware courts and the federal courts all applying the Federal Arbitration Act consistently hold that that means that the arbitrators

get to decide issues of substantive arbitrability. That is something that is incorporated by reference into the investment advisory agreement's arbitration clause.

Analogously, the provisions of the operating agreement relating to when money will be paid out to the partnership by the investment advisor,

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acting as manager, because he's chosen to or it has chosen to manage the Banders' money through these investment vehicles that it organized and managed, those provisions are likewise incorporated into the duties of the investment advisor under the investment advisory agreement.

So turning now to the question of substantive arbitrability. We've got an agreement. It references only AAA commercial arbitration. It uses the standard form of the AAA arbitration clause, as referenced in the T-Ink decision, which in T-Ink they used a different form of agreement. They didn't use this broad form of agreement that is found in the AAA sample clauses; but here they did.

The agreement says, "Any controversy or claim arising out of or relating to this agreement" shall be arbitrated. That's verbatim out of the standard AAA arbitration clause. In the T-Ink case, the Court said, "Under Gary, if you had done this, we'd send it to the arbitrator." But you didn't. You used narrower language in the T-Ink arbitration clause, and therefore the Court's going to decide substantive arbitrability.

The plaintiffs in this case argue

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that, as in Gary, they can point to the dispute resolution clauses of the operating agreements and say that creates an issue and the Court ought to decide substantive arbitrability. But Gary and T-Ink in those respects are very distinguishable on their facts from this case, because what is at issue in this case is who is going to decide arbitrability pursuant to the arbitration clause of the investment advisory agreement.

And what does the investment advisory agreement say about that? It isn't about what the whole panoply of evidence sitting out there might be that the arbitrators could consider in looking at the question of arbitrability; it is who, as between the Court and the arbitrator, is supposed to decide. And under Gary and T-Ink, and all of the federal cases that those courts relied on, the fact that the parties used a broad form AAA arbitration clause, referenced the AAA commercial arbitration rules which say that the arbitrators are empowered to determine their own jurisdiction, that is clear and unmistakable evidence that the parties, TowerHill Wealth Management and the partnership, agreed that, in a circumstance like we're facing now, the proper person to decide what the scope

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of the arbitrability is, for purposes of an arbitration initiated under the investment advisory agreement, is the arbitrator, not this court.

Plaintiffs are free to argue to the arbitrator that, "Well, all of these claims are based on duties that are provided in the operating agreements, and that should cause the arbitrator to conclude that in fact the parties didn't intend for those to be arbitrable." But that's a different question from the question of who gets to decide arbitrability. And here the answer to that question is, clearly, the arbitrator gets to decide arbitrability.

There's a different way of looking at this that I thought might be helpful to the Court and, that is, to consider the following possibility. Let's assume that the parties had entered into the investment advisory agreement in its present forum, as they in fact did, but let's take a further refinement of the existing facts and say that there's no dispute resolution clause in any of the operating agreements; and let's say that the partnership, upset with the way in which the money was being distributed to it from the investment LLCs, filed suit and said, "I'm suing

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you for damages. I think you breached these provisions of the operating agreement." Is there any doubt that if TowerHill Wealth Management walked into court and said, "Mr. Bander and his partnership have agreed to arbitrate any and all disputes arising under or relating to the investment advisory agreement, and the only reason he was involved in these investment LLCs, as we've called them, is because TowerHill Wealth Management was his advisor and we were using those as investment vehicles."

The cases are legion, Your Honor, in which in the converse situation, like I've hypothesized to the Court, courts have said those agreements are clearly -- those arbitration agreements clearly apply to parties such as in Mr. Bander's hypothetical situation that filed suit in court is going to be forced to arbitrate. And they would be forced to arbitrate, even if the claim were made against the investment LLC, because the investment LLC would walk into court and say, "I was an intended third-party beneficiary. The investment advisor and the manager -- the decisionmakers – are one and the same. They said we arbitrate any and all disputes arising under or relating to the investment advisory

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agreement, and this is such a dispute. Send us to arbitration." And any court that had jurisdiction to compel arbitration in that circumstance, I submit, would likely do so.

We're facing the flip side here. Mr. Bander has asserted his right to arbitration with TowerHill Wealth Management. They are now trying to frustrate that right. And that's not appropriate.

The arbitrators may or may not agree with TowerHill Wealth Management that these disputes properly ought to be decided by somebody else. They may agree with Mr. Bander. But one thing is clear. TowerHill Wealth Management and the partnership agreed that the question of what disputes should be arbitrated under the arbitration clause are going to be decided by the arbitrator and, for that reason, there is no substantial likelihood of success on the merits and

the preliminary injunction has to be denied by the Court.

THE COURT: Thank you.

MR. KNICKMEYER: There's a further --

THE COURT: No. Thank you. Mr. Jones.

MR. JONES: Your Honor, I think we're

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content to rely on our briefs. The only thing I'm a little bit confused about is that we have two letters. I've got two letters right here in front of me addressed to Mr. Knickmeyer expressly proposing mediation. In fact, we proposed mediation in front of Gil Sparks June 24 -- July 29th. There may be something I missed in why he was saying we didn't propose mediation. I think he used the term "pursuant to the procedures in the operating agreement." Maybe that's the distinction point. But I just wanted to point that out. And I think that everything else has been answered in our papers.

MR. KNICKMEYER: May I respond, Your Honor?

THE COURT: Yes.

MR. KNICKMEYER: The proposals that were made to us to arbitrate were not made pursuant to -- or to mediate -- were not made pursuant to the arbitration agreement. The first proposal, which was shortly following our acceptance of the Court's proposal, or suggestion to the parties at the July 7th conference. Within an hour after leaving Your Honor's

chambers I was on the phone with Mr. Wilson telling him, "We accepted the Court's

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proposal. Pick an arbitrator and we'd arbitrate." Mr. Wilson said, "I'll have to get back to you."

Ultimately we heard back from his partner -- or actually I think I heard back from Mr. Jones, by way of an e-mail. And the e-mail said, "We won't agree to any form of binding arbitration. We will agree to nonbinding arbitration, if you dismiss the AAA arbitration with prejudice."

The last of these letters said, "Well, let's go mediate everything. No ground rules, no particular forum. But by the way, the offer that we previously made to you to sit down in advance and provide you with information so that you can evaluate the strength and weaknesses of your claims, we aren't going to provide that to you in advance of the mediation. You come to mediation and we'll tell you what we want to tell you then." And that's what it was.

May I address the bond issues, Your Honor, because I think if the Court --

THE COURT: No, you may not.

Anything to respond to that, Mr. Jones?

MR. JONES: No, Your Honor.

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THE COURT: An astonishing amount of paper has been filed in a case which -- where the economics of it don't seem to justify it. But the issues are not very complex. The reality is that the Bander partnership evaded a clear contractual obligation and filed an arbitration complaint that almost entirely relies upon the operating agreement, which has a dispute resolution clause. Not only that, the Bander partnerships knew about the dispute resolution clause before it did it. There's correspondence indicating that.

Exhibit 3 to Miss Maguire's transmittal affidavit, in support of the motion for expedited proceedings, is the arbitration demand which quotes specifically from the arbitration -- I mean, from the operating agreements and their various withdrawal provisions. It does it at length. Not only that, the complaint in arbitration explicitly makes a claim under the operating agreements. I believe there was, frankly, at first, an unwillingness on the part of the defendants to acknowledge that. Now I think they have acknowledged it and changed their argument.

The reality is, they have done it.

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They pled claims. There's nothing in the investment advisory agreement that speaks to this question of when -- certainly not to the point of the days or weeks that are at issue here. It's all in the operating agreements. So there's been a pervasive and intentional attempt to litigate something or arbitrate

something in a forum different from the forum provided in the operating agreement.

Willie Gary is an interpretation of Justice Breyer's articulation of the clear and unmistakable standard and it relies upon federal court precedent. Interestingly, it's not clear that any of the Federal Court precedent or Willie Gary itself really are faithful to Justice Breyer's ruling.

As a eristic or, in human words, a shortcut, what federal Court's have done is say, "If you refer to AAA, that must mean we want -- that's clear and unmistakable evidence -- if the AAA rules say that arbitrators have the authority to decide on their own jurisdiction -- that that's clear and unmistakable evidence that the parties intended for the arbitrator to decide substantive arbitrability questions."

I think, if you reread

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Justice Breyer's decision, one would be skeptical about really that's what he meant. I think what he probably meant was, if you pick an arbitration service and the rules of that permit an arbitrator, if authorized, to decide substantive arbitrability and you say the arbitrator shall decide it, that would be clear and unmistakable evidence. And an overburdened Federal Court system, faced with a group of cases which are not its favorite, substantive arbitrability, got AAA rules and said, "If you mention the AAA, it goes."

In Willie Gary our Supreme Court, for efficiency reasons, adopted a somewhat similar rule, but adopted

it like many other state and, frankly, federal courts do, which is you first have to look at the clause. And the clause itself has to be capacious enough. And our state, under Willie Gary, has to provide for the arbitrator to have the power generally to resolve all disputes among the parties. Well, if there's ever a clause that doesn't qualify, it would be the clause at issue here in the investment advisory agreement. And there's a very simple reason why: Because it ain't the only clause. There's a specific dispute resolution clause in every operating agreement

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freely and voluntarily entered into by the Bander partnership which represented that it was a sophisticated investor in order to sign those.

If there was a dispute under those operating agreements, and the shoe were on the other foot and TowerHill in its capacity -- the manager, whatever you want to call it -- if TowerHill -- if the Bander partnership tried to invoke the jurisdiction of this Court -- say it moves first, so it sought nonbinding mediation and is responded to by TowerHill -- by TowerHill filing under the AAA -- under the investment advisory agreement, even though the dispute was under the operating agreements, I have no doubt the Bander partnership would say, "They don't get to do that. They gave us a specific contract to specifically govern the investment -- in particular, LLCs -- and we are invoking our rights under that. And there is a specific dispute resolution clause of that LLC agreement, and how dare a fiduciary try to use that other more general provision that doesn't even specifically speak to this dispute." That's exactly the

argument that the Bander partnership would make. And I know it's what it would make because, in every one of these cases, it's always about who goes

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to what forum. And whatever one the other guy picks, you pick a different one.

The reality is, there is no dispute resolution clause that generally provides for arbitrators to resolve all disputes among the parties, because there are several dispute resolution clauses. And under accepted principles of contractual interpretation, the more specific agreement on a subject would trump the more general one. And that's why I think the Bander partnership would rightly feel ill-used if TowerHill had done something in a situation, like I just mentioned, where it tried to hold its investor to a more general umbrella agreement, as opposed to the one that specifically governs the investment relationship and to a particular operating entity. So I don't believe Willie Gary applies.

And I believe the general rule -- and, remember, it's attractive for judges. And I'll admit it has a very great appeal to me. No judge relishes another substantive arbitrability dispute. It's just not fun. And what ADR clauses demonstrate -- and nothing demonstrates it like it here, because it was interesting because neither of you during your

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argument referenced the third dispute resolution clause that came up in the briefs. But there's not two.

I mean, there's not actually two because there are separate operating agreements for each of the operating LLCs into which the Bander partnership money was placed. But there's a subscription agreement. Right? And of course, the Banders didn't use that one. We have a trio of clauses. It may be even more, if you really think about it.

So Willie Gary just doesn't pertain. And the general rule remains the general rule, which is that courts determine substantive arbitrability. Courts may not like that. I can say for a fact many courts don't like it. And any person who is a judge can understand that. But it's our duty to do our job, and there is no clear and unmistakable evidence here that the parties to the operating agreement were intending to give the AAA arbitrator jurisdiction to decide across all the relationships what would go to arbitration.

So in that case, we're back in the old school, simple realm of I've got to decide substantive arbitrability. There's nothing unclear here. The Bander partnership is attempting to put into

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arbitration and AAA a dispute that it promised would be resolved. If it couldn't be resolved by nonbinding arbitration or mediation in the great state of Missouri, home of Chuck Berry, then it would come to the Delaware Court of Chancery.

It is no proper objection to this motion for preliminary injunction for the Bander partnership to complain that the plaintiffs did not go to nonbinding arbitration or mediation, when the Bander partnership

ignored the dispute resolution clause and sought to put into an improper forum its complaints under the operating agreements. First order of business in that situation is to vindicate your contractual rights and to protect yourself against the procession of something that wasn't contemplated by the parties.

Here, on the merits, there would be no basis to even implicate an arbitrator's time -- use of an arbitrator's time -- without citing to the operating agreements. The whole essence of the complaint in arbitration is that TowerHill, as a manager of these operating partnerships or LLCs – whatever they are -- whatever kind of alternative investment entity they are -- and we love them all in

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Delaware. We have many of them: LLCs, LLPs, all kinds of things. There are contractual rights that the Bander partnership had when it sought redemption and it has a right to have them adhere to, and those are to protect its right to get its money back with reasonable alacrity in accordance with the terms of the operating agreements. That's the whole essence of the complaint in arbitration. That's exactly the type of dispute covered by the operating agreement's dispute resolution clause.

Now, of course, the Bander partnership says, "They have said we are former members for some purposes and we can't get books and records." To me, that argument does not even pass the straight face test. Actually, the Bander partnership is -- I think, a defined term -- a redeeming member in its situation right now, and it's relying on the rights due to it as a

redeeming member. That is the term -- if you look at the part of -- by the way, next time you guys -- Mr. Jones and Mr. Dreisbach -- get together and talk about how to put together appendices, it would be a beautiful thing -- they're kind of all over the place. But 6.3 refers to the redeeming member shall receive the redemption value, less any fees charged in

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effecting such redemption.

I believe, in this situation, the Bander family partnership is a redeeming member. Now, it's cute to say they won't give us books and records. Well, withdrawal does have effects. Books and records rights, and things like, that are designed, for the most part, statutorily to allow someone who is an ongoing equity participant in an enterprise to seek out information relevant to its voting decisions and other things. By becoming a redeeming member, you are down to the rights have you as a redeeming member in arbitration. We have rights as a redeeming member to a certain form of prompt payment, and they were violated. That is exactly the core stuff that might make up a dispute between the manager and a member. That is exactly the thing that the Bander family partnership unambiguously -- clearly no question -- consented to have adjudicated in the courts of this state, if the nonbinding ADR process in Missouri did not work.

There is no temporal problem. There is no constitutional problem. And the constitutional thing, I actually -- I will say, slight invocations. What I mean is invocations of the historic

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protections -- important protections of the due process clause on slight grounds is something that I think happens too much in commercial disputes.

When a sophisticated investor has to make representations that its sophisticated, that it does other things, makes multimillion dollar investments in private partnerships and freely consents to jurisdiction in a state over a class of disputes arising under the contract, and then files a contractual claim, there is no due process question. Simply to give someone -- I admit, no one likes flying into American airports. And that's a burden. But I don't think we can equate that with a due process violation.

In the future, then, if you don't want to travel on, you know, interstate airlines, then you just sign dispute resolution clauses that say I'm either going to be in my back yard or not. But this is a freely consented to situation and, as a result, there is no due process problem with using either of the modes of service, and the contractual mode of service is perfectly proper. It answers the 14th Amendment question and answers any statutory requirement as to service of process.

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So the inquiry here today, it really becomes quite simple. The Court determines arbitrability. The Bander Family Partnership has tried to transport claims that clearly have to be resolved in accordance with the dispute resolution clauses in the operating agreement to a forum in which TowerHill did not

consent. Under case law you, in Delaware, subjecting someone to arbitration over claims they didn't consent gives rise to irreparable injury. I actually think you can almost grant summary judgment on the merits, but it's enough that there be a reasonable probability of success on the merits, and that is easily shown with respect to the question of substantive arbitrability.

And I think, with respect to the balance of the harms, the Bander Family Partnership actually does not get -- is not in a favorable position here. In fact, it's going to shape the scope of my injunction. My injunction scope is going to be that the AAA arbitrations are stopped in their tracks until the dispute resolution procedures under the operating agreements are concluded in their entirety. I'm not going to get into a thing of, frankly, worrying about the Bander Family Partnership now

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trying to excruciatingly edit the previous complaint. You live with your choices. There's been several.

I don't know when this case was filed, but it's been here for several months, I think, or a couple months. There's been plenty of time to try to write a complaint without relying on the terms of the operating agreements. And I think there's a reason why it wasn't done, which is, absent the specific provisions of the operating agreements relating to when a redeeming member's investment funds would be returned to it wouldn't be much of a claim. And given the fact that the Bander Family Partnership tried to end run clear contractual provisions, I think it's inefficient and, frankly, inequitable for there to be dueling

proceedings. We can finish the core aspect of it and, if there's anything left, see what's left, and then collateral effect can be given to the rulings here.

I believe also my consideration of this -- there's no jurisdictional problem with this court handling it. Equities jurisdiction has been implicated. For the reasons I've stated, the complaint states a claim. And with respect to the fact that the nonbinding ADR proceedings haven't taken

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place, if there's anyone's fault on that, it's the Bander Family Partnership.

I'm happy to stay these proceedings as to the merits, not the injunction. The injunction would put into effect -- I'll have Mr. Jones proffer an order to the other side so you can ponder its terms. But I have no desire to jump to the merits of the dispute between the partnership and the plaintiffs here if the nonbinding procedures might succeed. But that's going to require an answer by the Bander Family Partnership by Tuesday of next week that it wishes to go that route. And if it doesn't want to do that, the other side doesn't have to do something that's futile. But if you wish to take a crack at it in the home of Chuck Berry and the American headquarters of America's -- of Belgium's largest brewing company, you're welcome to do that, and I wish the parties well under that.

But that's really -- the Bander Family Partnership is going to have to make a decision. You either want to do that or you don't. If you don't want to do it, you're essentially saying that process won't work, and then

you end up in the Delaware Court of Chancery. And then we'll go to the

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merits, and we'll finish that, and the AAA arbitration will be enjoined until this case is final, in a sense that all appeals have been exhausted.

I am not going to get into the implications of the subscription agreement. I believe that no party has actually invoked the dispute resolution clause in that agreement.

I would suggest, this is an interesting lesson in contractual freedom. The fact that you had the freedom to proliferate dispute resolution clauses doesn't mean it's necessarily a wise thing to do. And related agreements ought to be read in relationship. In fact, my ruling today takes into account -- I respect Mr. Knickmeyer's disagreement probably with the way they pieced them together. And it may be that the subscription agreement, for example, has a different relationship to the operating agreement than the investment advisory contract does, and that the dispute resolution clause, frankly, is written differently in the subscription agreement than the one in the investment advisory. I take that relationship into account.

But today this specific trumps the

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more general. Who knows what happens if we have to get into the third. Although, frankly, I will tell you all,

having put this before me with these two choices, there's a serious risk of laches. If anybody tries to invoke the other thing at this point, you kind of make your choices in life.

I also hope that at some level there's economic rationality underneath all this, which is this is not a class action. It's a class action that's waiting to emerge. That's a different thing. But the amounts in controversy, I believe, are such that a sophisticated investor and an investment advisor -- it's in your mutual self-interest to find some reasoned way to get this done that's cost effective. And I don't want to get into the back and forth about the parties. One of the difficult things -- that's why you have dispute resolution clauses. They're supposed to up front tell you where you're going to do things. The problem is that people often have trouble getting them clear. And then, after the fact, the natural impulse reaction is, if my opponent wants it, it looks good to me, too; but if my opponent wants it, I can't see the flaw in it, but there must be something about it that stinks and so

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I'm just going to reject it. I realize that dynamic.

I would urge, for everybody's sake, because I do care about the prudent use of society's resources, and, frankly, about clients actually, at the end of litigation, if you prove your point that there's something actually there. And I'll touch on that regard. I've also taken into consideration things like the withholding of the funds. If there has been a real threat by the Bander Family Partnership to bring litigation in the guise of threat of theft, I will extend the injunction to that and I will

cover it. So you can discuss that in your communications about the draft.

If someone is claiming something and being open about it under a contractual provision, it seems to me the first instance is you adjudicate the contract case. It's a strange thing to call theft. Again, the more specific -- it may be that TowerHill is wrong. But that doesn't change the where issue, which is where do you find out the answer to that question. If TowerHill is wrongfully holding back funds under a contractual provision, that's a breach of contract and there are remedies for a breach of contract. And I hadn't known that in the United

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States that -- in 2008 -- we go around -- if someone has an erroneous interpretation of a contract that that's theft. Could be. But theft is -- I think usually has a mens rae requirement attached to it.

I don't remember -- I understand negligent operation of a motor vehicle, negligent homicide. I haven't heard many prosecutors, for example, prosecuting people for negligent theft. In fact, theft is one of those ones where you pretty much have to prove that the person knowingly took someone else's property. And, you know, if you got -- I suppose, if the contract interpretation is so utterly frivolous that it does amount to theft, that's fine. But, you know, then you'd go into the next proceeding with a finding to that effect, which would be good for you. But if it turns out that it was properly in exercise of contractual discretion, then there is no theft thing.

And, again, I think people are the master of their own pleadings. And I invite anyone -- any reasonable reader of the complaint in arbitration would conclude that this case is -- that the dispute between the Bander Family Partnership and TowerHill and its entities is almost entirely centered on

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compliance with the operating agreements. And even the dispute about the holdback really arises out of that same thing, which is, can there be a holdback by the manager for its costs in litigating over the question about whether the redemption provisions were honored in a way that accords with the plain language of the contract.

So, for the reasons I've stated today, I'm going to enter a preliminary injunction.

I'm going to deny the motion to dismiss.

I am not going to require a bond. I don't believe a bond is necessary. I don't understand what risk there is that's posed by the entry of this kind of an injunction that would require the posting of a substantial bond. And you have just as much security after I grant this injunction as you had before I do.

And this is not a case where I'm holding up a multibillion dollar transaction at the instance of someone. I'm not holding up any transaction at all. I don't believe there's been any freezing order, or something else sought against TowerHill, or anything about dissipation of assets.

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So all this is saying is that the Bander Family Partnership has a shot to get its money, but it's going to have to take its shot in the forum it agreed to take it in.

For those of you going back to St. Louis, I hope you can get -- either have a private plane, or you can get to Philly and get the heck out of here.

And I'll wait to hear from counsel about the form of order. Thank you.

(Court Adjourned at 2:45 p.m.)

[p.53]

CERTIFICATE

I, DIANE G. McGRELLIS, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 52 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 27th day of August, 2008.

/s/ Diane G. McGrellis

Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 108-PS
Expiration: Permanent

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 474, 2008

[Filed October 20, 2008]

THE BANDER FAMILY PARTNERSHIP, L.P.	)
	)
Defendant Below, Appellant,	)
	)
v.	)
	)
TOWERHILL WEALTH MANAGEMENT, LLC, et al.,	)
	)
Plaintiffs Below, Appellees.	)
	)

On Appeal from the Court of Chancery, C.A. No. 3830-VCS

APPELLANT'S MOTION FOR STAY PENDING APPEAL

Appellant, The Bander Family Partnership, LP, ("Bander"), moves for an Order staying all proceedings in the case below. As grounds for its motion, and in support thereof, Bander states:

1) A stay of the proceedings below is necessary to avoid irreparable harm to Bander's arbitration rights sought to be vindicated through this appeal.

2) The case below arises out of an arbitration pending before the American Arbitration Association between Bander and its investment advisor, Appellee TowerHill Wealth Management, LLC (the "Advisor"). Bander initiated the arbitration pursuant to the mandatory arbitration clause of its advisory agreement with the Advisor and in order to resolve disputes that arose when the Advisor (a) refused to provide information about Bander's investments, and (b) refused to timely return Bander's money being managed by the Advisor through the other Appellees, which are three limited liability companies managed by the Advisor.

3) Appellees sued Bander to enjoin the arbitration and secure a declaration that Appellants are not liable to Bander for withholding in excess of $1 million of Bander's money.

4) In the Order from which this appeal is taken (the "Order"), the Court of Chancery preliminarily enjoined Bander from proceeding with the Arbitration and denied Bander's motion to dismiss for lack of personal and subject matter jurisdiction.

5) After commencing this appeal, which is as of right pursuant to 9 U.S.C. §16(a)(2) and 10 *Del. C.* §5719(a)(2) insofar as it is from the Order enjoining the arbitration, and discretionary pursuant to Supreme Court Rule 42, insofar as it is from the denial of Bander's motion to dismiss, Bander moved the Court of Chancery to stay its proceedings.

6) In a Letter Opinion issued October 9, 2008 (the "Opinion"), the Court of Chancery overruled Bander's motion to stay, based on its conclusions that Bander has no statutory right of appeal[1] and that Bander's Rule 42 Application for Certification should be denied.

7) When appeals are taken from interlocutory orders adverse to arbitration rights, the unique nature of such rights leads to the conclusion that proceedings in the trial court should be stayed pending the conclusion of the appeal because in the absence of a stay, an objective of the appeal – preserving the right to speedy, cost effective dispute resolution that is a core purpose of arbitration – will be frustrated. *See, e.g., Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997) (addressing appeals taken pursuant to 9 U. S .C. §16(a)(2); *Mikohn Gaming Corp. v. McCrea*, 89 P.3d 36, 38 (Nev. 2004) (addressing appeals taken pursuant to the Uniform Arbitration Act as enacted in Nevada).

8) A stay of proceedings is also warranted under the four factors enumerated by this Court in

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[1] Opinion, p. 3, n. 3. No case cited by the Court of Chancery holds that 9 U.S.C. §16(a)(2) applies only to proceedings in federal courts, or that 10 *Del. C.* §5719(a)(2) applies only to arbitration agreements providing for arbitration hearing in Delaware. Neither statute's text suggests that it is so limited, nor do other provisions of the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, or the Uniform Arbitration Act, 10 *Del. C.* §5701 *et seq.* purport to so limit the reach of these statutes. Even those cases which have concluded that the FAA does not apply to appeals from state court's orders recognize that immediate appellate review of trial court orders adverse to arbitration rights is necessary. *See, e.g., Jack B. Anglin Co. Inc. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992).

DaimlerChrysler Corp. v. Delaware Dept. of Ins., 938 A.2d 623 (Del. 2007).

9) Bander's appeal has substantial prospects for success on the merits. The Order addresses and resolves an issue of arbitrability even though (a) this Court's decision in *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) requires the issue to be left to the arbitrators, and (b) under Missouri decisions[2], the disputes are clearly arbitrable pursuant to the advisory agreement. *Kansas City Urology, P.A. v. United Healthcare Services*, 261 S.W.3d 7, 12 (W.D. Mo., 2008). The Order also upholds the Court of Chancery's personal jurisdiction over Bander despite the uncontoverted facts that (a) the sole sources of that jurisdiction are conditional contractual consents to jurisdiction, and (b) the express condition precedent to such consents has not occurred.

10) Absent the requested stay, Bander will suffer irreparable harm because it will be forced during the appeal to litigate disputes the Advisor agreed to resolve through arbitration.

11) Appellees will sustain no harm from the stay. The injunction against arbitration will remain in effect during the appeal and Appellees will continue to retain control of Bander's money

12) A stay is also appropriate to avoid litigation expenses during the pendency of an appeal. *Unisuper*,

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[2] The Advisor and Bander agreed that Missouri law would govern their relationship.

Ltd. v. News Corp., 2006 WL 207505 at *5 (Del. Ch. Jan. 19, 2006).

WHEREFORE, The Bander Family Partnership, L.P. requests the Court to grant its motion, and Order the proceedings of the Court of Chancery in C.A. No. 3830 stayed pending the conclusion of this appeal.

/s/ Meredith Stewart
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OF COUNSEL:

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Dated: October 20, 2008

APPENDIX G

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. _____

[Filed September 17, 2008]

THE BANDER FAMILY PARTNERSHIP, L.P. Defendant Below, Appellant, v. TOWERHILL WEALTH MANAGEMENT, LLC, f/k/a CAPITAL PRIVATE WEALTH MANAGEMENT, LLC, TOWERHILL US EQUITIES, LLC, f/k/a NEWPORT NET PERFORMANCE LLC, TOWERHILL LONG/SHORT EQUITY, f/k/a CAPITAL PRIVATE WEALTH STOCK SELECTION LLC and TOWERHILL INTERNATIONAL EQUITIES, LLC, f/k/a CPW INTERNATIONAL EQUITIES, LLC Plaintiffs Below, Appellees.	)

NOTICE OF APPEAL
FROM INTERLOCUTORY ORDER

To: Stephen E. Jenkins
Richard I. G. Jones, Jr.
Lauren E. Maguire
ASHBY & GEDDES
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 79899

Of Counsel:

Harry B. Wilson
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St. Louis, Missouri 63105

and

R. Prescott Sifton, Jr.
HUSCH BLACKWELL SANDERS LLP
720 Olive Street, Suite 2400
St. Louis, MO 63101

PLEASE TAKE NOTICE that pursuant to 9 U.S.C. §16(a)(2), 10 *Del. C.* §5719(a)(2), Supreme Court Rule 42 and Court of Chancery Rule 72, Defendant-Below Appellant the Bander Family Partnership, L.P. (the "Partnership") does hereby appeal to the Supreme Court of the State of Delaware from the order of the Court of Chancery dated September 8, 2008 (the "Order"), enjoining an arbitration in case number C.A. No. 3830-VCS. A copy of the Order sought to be reviewed is attached hereto as **Exhibit A**.

PLEASE TAKE FURTHER NOTICE that the Partnership hereby petitions this Court to accept an

appeal from an interlocutory order of the Court of Chancery and represents as follows:

1. The Order was entered on September 8, 2008;

2. Defendant-Below Appellant's Application for Certification was filed in the Court of Chancery on September 17, 2008 (**Exhibit B** hereto);

3. A Response by the Plaintiffs-Below Appellees has not yet been filed in the Court of Chancery;

4. The Court of Chancery has not yet taken any action with respect to the Application for Certification.

The names and addresses of the attorneys below for Plaintiffs-Below Appellees are:

Stephen E. Jenkins
Richard I.G. Jones, Jr.
Lauren E. Maguire
ASHBY & GEDDES
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 79899

Of Counsel:

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and

R. Prescott Sifton, Jr.
HUSCH BLACKWELL SANDERS LLP
720 Olive Street, Suite 2400
St. Louis, MO 63101

The parties against whom the appeal is taken are TowerHill Wealth Management, LLC f/k/a Capital Private Wealth Management, LLC; TowerHill US Equities, LLC f/k/a Newport Net Performance, LLC; TowerHill Long/Short Equity, f/k/a Capital Private Wealth Stock Selection, LLC; and Towerhill Internation Equities, LLC, f/k/a CPW International Equities, LLC.

PLEASE TARE FURTHER NOTICE that appellant hereby designates the transcripts in accordance with Rules 42(d)(vi)(C) and 9(e)(ii) in the following manner: (a) the transcript of the hearing on Plaintiffs' Motion for Preliminary Injunction and Defendant's Motion to Dismiss held August 22, 2008 commencing at 1:30 p.m. and (b) the transcript of the telephonic hearing on the proposed form of preliminary injunction held September 5, 2008 commencing at 11:30 a.m. Appellant further designates that these proceedings have already been transcribed, thus no transcript need be ordered.

Dated: September 17, 2008.

/s/ Daniel A. Dreisbach (#2583)
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EXHIBIT A

EXHIBIT PREVIOUSLY REPRODUCED IN APPENDIX AT APPENDIX C, 18a

EXHIBIT B

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

C.A. No. 3830-VCS

[Filed September 17, 2008]

TOWERHILL WEALTH MANAGEMENT, LLC f/k/a CAPITAL PRIVATE WEALTH MANAGEMENT, LLC, TOWERHILL US EQUITIES, LLC, f/k/a NEWPORT NET PERFORMANCE LLC, TOWERHILL LONG/ SHORT EQUITY, f/k/a CAPITAL PRIVATE WEALTH STOCK SELECTION, LLC and TOWERHILL INTERNATIONAL EQUITIES, LLC, f/k/a CPW INTERNATIONAL EQUITIES, LLC	)
Plaintiffs,	)
v.	)
THE BANDER FAMILY PARTNERSHIP, L.P.	)
Defendant.	)

DEFENDANT'S APPLICATION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

Pursuant to Supreme Court Rule 42, Defendant, The Bander Family Partnership, LP (the "Partnership") requests that the Court's Order entered

September 8, 2008 (the "Order") be certified for interlocutory appeal.

Issues Presented Warranting Interlocutory Review

The Order determines several substantial issues.[1] Specifically, it determines that:

- The Court of Chancery may properly exercise personal jurisdiction over the Partnership (a non-resident) based solely upon the Partnership's expressly conditional consent to personal jurisdiction even where it is undisputed that the express conditions precedent to that consent – here, non-binding alternative dispute resolution proceedings – have not occurred;

- Despite the decision in *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006) and the provisions of 10 *Del. C.* §§5701 and 5703(b),[2] in the context of a motion to enjoin an

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[1] These are not the only issues determined by the Order, and the Partnership does not intend, by not separately identifying other issues, to waive its rights respecting those issues. The identified issues are those which cause the Order to meet the criteria for certification pursuant to Rule 42(b).

[2] The Partnership first pointed out the limitations on the Court of Chancery's authority prescribed by the Uniform Arbitration Act, 10 *Del. C.* §5701 *et seq.*, in a motion for leave to submit additional authorities filed August 26, 2008, after the Court's decision to sustain Plaintiffs' motion to preliminarily enjoin an arbitration was announced, but before the preliminary injunction was actually issued by the Court. Because that statute defines the

arbitration the Court of Chancery has subject matter jurisdiction to determine whether a dispute between two parties is arbitrable pursuant to a broad, mandatory arbitration clause prescribing arbitration under the Commercial Arbitration Rules of the American Arbitration Association, even where (unlike the situation in *Willie Gary),* the written agreement between the parties to the arbitration does not suggest or imply that any dispute arising out of or relating to the agreement, or any form of relief is excluded from their agreement to arbitrate.[3]

- Despite the provisions of 10 *Del. C.* §5703(b), the Court of Chancery may enjoin an arbitration at the instance of (a) a party who has participated in the arbitration and (b) persons who are not parties to the arbitration.

- The Court of Chancery may properly exercise its jurisdiction to declare the parties' rights at the request of plaintiffs who seek only determinations that exculpate them from

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scope of the Court of Chancery's subject matter jurisdiction in disputes involving arbitration agreements, its provisions may be raised at any time. *Plummer v. Sherman*, 861 A.2d 1238, 1243 (Del. 2004).

[3] The parties to the arbitration agreement in question did agree that the Partnership has the option of pursuing certain types of claims through a lawsuit filed with the Circuit Court for St. Louis County, Missouri. The Partnership has not, however, exercised that option, and the existence of that option was not a stated basis for the Court of Chancery's determination that it has subject matter jurisdiction over the issue of arbitrability.

liability for injuries caused by plaintiffs' completed, rather than prospective, actions.

Reasons For Granting The Application

In making the determinations described above, the Court established a number of legal rights, First, the Court established Plaintiffs' legal right to invoke the Court's jurisdiction over the Partnership pursuant to an expressly conditional contractual consent to jurisdiction and service of process even though the express condition precedent to that consent has not occurred. Second, the Court's determination establishes TowerHill Wealth Management, LLC's (the "Advisor") right to avoid its obligations pursuant to a mandatory arbitration agreement by invoking the provisions of a different, but not conflicting agreement. Third, by denying the Partnership's motion to dismiss, the Court established Plaintiffs' right to seek a declaratory judgment exculpating them from liability for actions they took prior to invoking the Court's jurisdiction.

The Court's determinations uphold the controverted personal and subject matter jurisdiction of the Court. As explained below, these determinations should turn on questions of law (i) upon which there are conflicting trial court decisions, and (ii) which relate to application of the Uniform Arbitration Act which have not been, but should be, settled by the Supreme Court.

Furthermore, a successful interlocutory appeal from the Court's determinations will terminate this litigation, and considerations of justice would also be served by interlocutory review of the Order. In

particular, interlocutory review of the Order is now the only effective means of enforcing Partnership's agreement with the Advisor to resolve through binding arbitration disputes arising out of or related to the investment advisory agreement between those parties, including the parties' agreement that issues of arbitrability will be resolved by the arbitrator.

For these reasons, the Partnership's application for certification of the Order for interlocutory appeal satisfies the criteria specified in Supreme Court Rule 42(b).

The Partnership has a statutorily prescribed right of immediate appeal from the Order insofar as it enjoins the arbitration commenced by the Partnership. 9 U.S.C. §16(a)(2); 10 *Del. C.* §5719(a)(2). The Court's decision to deny the Partnership's motion to dismiss presents a number of the same issues that will be addressed in the Partnership's appeal from the Order's injunction against the Partnership's pending arbitration. Because the issues presented by the different aspects of the Order extensively overlap, considerations of judicial economy make it sensible for the Court of Chancery to certify and for the Supreme Court to accept the Partnership's interlocutory appeal from the Order in its entirety.

Accordingly, the Partnership's Application for Certification pursuant to Supreme Court Rule 42 should be granted.

Factual Background

The Partnership is a Missouri limited partnership. It has no presence in Delaware. Until it appeared to

defend this action, the Partnership had never done any business in Delaware.

The Advisor is a Delaware limited liability company. The Advisor's only offices are located in Missouri. From those offices, the Advisor operates as an investment advisor. The Advisor is registered as an investment advisor with the United States Securities and Exchange Commission and the Missouri Securities Commissioner, but not with the Delaware Securities Commissioner.

The other three Plaintiffs, TowerHill Long/Short Equity, LLC ("Long/Short"), TowerHill US Equities, LLC ("US Equities") and TowerHill International Equities, LLC ("International Equities") (collectively, the "Investment LLCs"), are Delaware limited liability companies. The Advisor is the manager of each Investment LLC. The Advisor utilizes the Investment LLCs as investment vehicles though which the Advisor pools the assets of Advisor's clients to make particular types of investments.

In 2005, the Advisor and the Partnership signed a written investment advisory agreement (the "IAA").[4] Pursuant to the IAA, the Advisor agreed to manage the Partnership's investments. The IAA specifically contemplates that day-to-day investment services will be subcontracted to the Investment LLCs (managed by the Advisor) or other investment managers selected by the Advisor. Insofar as dispute resolution is concerned, the IAA prescribes mandatory, binding arbitration, as follows:

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[4] A copy of the IAA is annexed as Exhibit 1 to this Application.

> Any controversy or claim arising out of or relating to this Agreement, or to the interpretation, breach or enforcement thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association and judgment upon the award rendered may be entered in any court having jurisdiction thereover.

As contemplated by the IAA, portions of the Partnership's investments were managed by the Advisor through the Investment LLCs. For that reason, the Partnership became a member of each Investment LLC. Each Investment LLC's operating agreement includes provisions concerning dispute resolution. These state:

> The Manager and the Members agree to submit to the jurisdiction of the Court of Chancery of the State of Delaware for resolution of any disputes arising under or in connection with the Agreement and that service of process may be effected upon each of them by serving the registered agent for the Company in the State of Delaware as set forth for the Company on the records of the Secretary of State of the State of Delaware.

> The foregoing . . . notwithstanding, the Members and the Manager agree that any disputes relating to, arising under or in connection with this Agreement or the Company generally shall first be submitted to non-binding arbitration or mediation . . . prior to being submitted to the Delaware Court of Chancery.

The Investment LLCs' Operating Agreements also prescribe when and how members may redeem their membership interests. Members are required to give the Advisor written notice of their redemption at least 30 days before a "valuation date." The redemption value of the member's interest is fixed as of the valuation date. Long/Short and International Equities' Operating Agreements require that the redemption value of a redeeming member's interest be paid "as soon as reasonably practicable," but that in all events, 90% of that value shall be paid no later than the 30th business day following the effective date of the redemption, and the remaining 10% must be paid upon completion of the next audit of the company's financial statements. US Equities' Operating Agreement requires that 90% of the redemption value must be paid no later than the 30th business day following the effective date of the redemption, and the remaining 10% must be paid upon completion of the next "valuation audit."

In November, 2007, the Partnership began terminating its relationship with the Advisor. On November 21, 2007 the Partnership notified the Advisor in writing that it was redeeming its interests in the Investment LLCs, effective December 31, 2007.

Disputes arose between the Partnership and Advisor over (a) the information to which the Partnership was entitled, (b) when the proceeds of the Partnership's membership interests were distributable to the Partnership, and (c) whether the Partnership is entitled to be paid interest on the proceeds of its membership interests for all or any portion of the periods between the valuation date and the date(s) on

which proceeds of the Partnership's membership interests are distributed to the Partnership.

By June 2, 2008, the Partnership was still waiting for distributions of more than $1.8 million of the stated redemption values of its membership interests in the Investment LLCs. It believes these payments were past due at that time.[5]

In an effort to resolve its disputes with the Advisor, on June 2, 2008 the Partnership demanded arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as it had agreed it would in the IAA. On June 13, 2008, the Advisor and the Investment LLCs sued the Partnership in the Court of Chancery and moved to enjoin the arbitration. A copy of the Demand for Arbitration (also attached as Exhibit 3 to the Complaint, Trans. I.D. No. 20233301), is appended as Exhibit 2 to this Application.

The sole basis upon which Plaintiffs allege the Court of Chancery has personal jurisdiction over the Partnership is the dispute resolution clauses of the

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[5] The audit opinion on US Equities' 2007 audited financial statements is dated April 25, 2008. The date on which US Equities' "valuation audit" was completed is not known, but it presumably preceded the audit of the financial statements, making the final distribution in respect of the Partnership's interest in US Equities due sometime prior to April 25, 2008. International Equities' and Long/Short's 2007 audited financial statements had not been issued by June 2, 2008, but the Partnership had information suggesting that it was reasonably practicable for those Investment LLCs to have distributed the redemption values of its membership interests in full on or shortly after the valuation date.

Investment LLCs' Operating Agreements, quoted above. Plaintiffs sought (a) a declaration that they owe the Partnership no interest on the money theretofore distributed to or withheld from the Partnership and constituting proceeds of the Partnership's membership interests in the Investment LLCs, and (b) an injunction prohibiting the Partnership from pursuing the arbitration it had initiated with the Advisor. By later amendment of their Complaint and supplementation of their motion for a preliminary injunction, Plaintiffs sought a more expansive injunction (to enjoin the Partnership from initiating litigation with Advisor pursuant to an option held by the Partnership to litigate, rather than arbitrate, certain disputes with the Advisor) and a declaration of Plaintiffs' rights, whether or not the other disputes with the Partnership are ultimately resolved in their favor, to have their attorneys' fees paid from the distributions they are withholding from the Partnership.

Shortly after filing this lawsuit, the Advisor filed an answer to the Partnership's arbitration demand, and moved to dismiss the arbitration on the ground that the dispute was not arbitrable pursuant to the IAA.

The Partnership moved to dismiss this action, citing, among other matters, the absence of personal jurisdiction, insufficiency of service of process, and the absence of subject matter jurisdiction. The Partnership opposed the motion to enjoin it from arbitrating its dispute with the Advisor, citing the absence of personal and subject matter jurisdiction, the consequent unlikelihood that Plaintiffs will succeed on the merits of their claim for a permanent injunction,

and the lack of irreparable harm in the absence of a preliminary injunction.

On September 8, 2008, the Court entered its Order denying the Partnership's motion to dismiss and enjoining the Partnership from pursuing the arbitration with the AAA. The Court's reasoning is set forth in the transcript of an August 22, 2008 hearing, a copy of which is annexed as Exhibit 3.[6]

Argument

Under Supreme Court Rule 42(b), an interlocutory appeal may be certified to the Supreme Court if the order appealed from (i) determines substantial issues, (ii) establishes a legal right, and (iii) meets one or more of the criteria set forth in Supreme Court Rule 42(b)(i)-(v). *See* Supr. Ct. R. 42(b). Here, the Order determines substantial issues and establishes legal rights. It sustains the controverted jurisdiction of the Court of Chancery. In so doing, the Order resolves a legal question – when have parties so clearly and unmistakably evinced an agreement to have questions of arbitrability resolved by arbitrators that the courts lack jurisdiction over the issue? – in a manner that conflicts with another recent decision of the Court of Chancery. Properly analyzed, that issue relates to the construction or application of provisions of the Uniform Arbitration Act, 10 *Del. C.* §5701 et seq., that have not been, but should be, settled by the Delaware Supreme Court.

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[6] *Towerhill Wealth Mgt. LLC v. The Bander Family Partnership, L.P.*, C.A. No. 3830-VCS (Del. Ch. Aug. 22, 2008) (TRANSCRIPT) (hereinafter "Tr.").

A successful appeal will terminate this litigation. Further, interlocutory review of the Order will serve considerations of justice, since such review is now the only means by which the Partnership's right to mandatory arbitration of its disputes with its investment advisor can be vindicated effectively. Accordingly, the Court should certify the Order for interlocutory appeal in accordance with Supreme Court Rule 42.

A. The Order Determines Substantial Issues and Establishes Legal Rights.

The first two prerequisites to certification of an order for interlocutory appeal are that the Order (1) determines substantial issues and (2) establishes a legal right. Sup. Ct. R. 42(b). A substantial issue is one which relates to the merits of the case and not to collateral matters, such as discovery. *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973). When an order is of "vital importance" to the litigation, the "substantial issue" requirement is met. *C v. C*, 320 A.2d 717, 720 (Del. 1974).

Few, if any, issues can be more substantial than those of the Court's jurisdiction over the defendant and its subject matter jurisdiction over the controversy submitted for adjudication. Without both types of jurisdiction, the case cannot proceed. Here, both the decision to deny the Partnership's motion to dismiss and the decision to grant Plaintiffs' motion for a preliminary injunction rest at least in part on the Court's determination that it has both personal jurisdiction of the Partnership and subject matter jurisdiction to decide whether the dispute the Partnership seeks to arbitrate with the Advisor is

arbitrable pursuant to the IAA. The Order also determined another issue of subject matter jurisdiction: whether the Court should exercise its jurisdiction to (potentially) exculpate Plaintiffs from any liability to the Partnership for actions already taken by Plaintiffs?

For the same reason that the Order determines substantial issues, it also establishes legal rights. See Supr. Ct. R. 42(b), The Order determines the Plaintiffs' rights to bring the Partnership before the Court of Chancery without first satisfying the express condition precedent to the Partnership's agreement to submit to the Court of Chancery's jurisdiction. It also establishes the Plaintiffs' rights to have the Court of Chancery, rather than arbitrators, determine whether the disputes between the Partnership and the Advisor submitted for arbitration are arbitrable pursuant to the mandatory arbitration clause of the IAA. Additionally, the Order establishes the Plaintiffs' right to seek a declaratory judgment exculpating Plaintiffs for liability to the Partnership for acts already committed by one or more of the Plaintiffs.

Delaware courts have held repeatedly that interlocutory orders establishing as a matter of law the right of a plaintiff to maintain an action "establishes a legal right" within the meaning of Rule 42(b). *See, e.g., American Appliance, Inc. v. Slate ex rel. Brady*, 712 A.2d 1001, 1001 (Del. 1998) (granting interlocutory review regarding lower court's subject matter jurisdiction); *Shaev v. Wyly*, 1998 WL 155540 (Del. Ch. Mar. 26, 1998) (certifying for interlocutory appeal an order denying defendants' motion for summary judgment based in part on argument that derivative

plaintiff lacked standing); *Warner v. Star Enter.*, 1995 WL 562250 (Del. Super. Aug. 31, 1995) (certifying for interlocutory appeal an order denying defendants' motion for summary judgment based on argument that plaintiff lacked standing), interlocutory appeal accepted and judgment rev'd sub nom. *Mayer Pollock Steel Corp. v. Warner,* 1996 WL 145791 (Del. Mar. 4, 1996) (ORDER); *Najjar v. Roland Int'l Corp.*, 387 A.2d 709 (Del. Ch. 1978) (denying motion to dismiss stockholder class challenge to merger for failure to state a claim), interlocutory appeal accepted and judgment aff'd, 407 A.2d 1032, 1034 n.2 (Del, 1979). Accordingly, both mandatory criteria for certification and acceptance of an interlocutory appeal are satisfied in this case.

B. The Orders Also Meet The Requirements Of Supreme Court Rule 42(b)(i),(ii) and (v).

In addition to satisfying the compulsory first and second tests for interlocutory review prescribed by Supreme Court Rule 42(b), the Order satisfies several of the five alternative tests, only one of which must be met under the third prong of Supreme Court Rule 42(b). Specifically, the Order resolves several questions of law in ways that conflict with the decisions of other trial courts and it sustains the Court of Chancery's subject matter jurisdiction in a way that relates to the application of the Uniform Arbitration Act that has not been, but should be, settled by the Supreme Court. Supr. Ct. R. 42(b)(i) (incorporating by reference the standards of Supr. Ct. R. 41(b)). The Order sustains the controverted jurisdiction of the Court of Chancery. Supr. Ct. R. 42(b)(ii). And it involves case dispositive issues, such that review of the Order may terminate

the litigation and otherwise serve considerations of justice. Supr. Ct. R. 42(b)(v).

1. The Question Of Whether The Court Of Chancery Has Personal Jurisdiction Over The Partnership Was Resolved In A Way That Conflicts With Other Decisions Of The Court of Chancery And Upholds The Controverted Jurisdiction Of That Court.

The Order upheld the Court of Chancery's personal jurisdiction over the Partnership. In doing so, it sustained the controverted jurisdiction of the Court of Chancery, seemingly in a way that conflicts with the decisions in *Eisenbud v. Omnitech*, 1996 WL 162245 (Del. Ch. Mar. 21, 1996) and *Prestancia Management Group, Inc. v. Virginia Heritage Foundation, II LLC*, 2005 WL 1364616 (Del. Ch. May 27, 2005).

The Court of Chancery's personal jurisdiction over the Partnership is predicated upon the Partnership's supposed consent to that jurisdiction pursuant to provisions of the Investment LLCs' Operating Agreements. Those Operating Agreements provide that the Members and Manager of the limited liability company agree to submit to the jurisdiction of the Court of Chancery for resolution of disputes "arising under or in connection with the [Operating] Agreement." It is undisputed, however, that even if the Partnership remains bound by that provision of the Operating Agreements,[7] the Partnership's agreement

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[7] The Partnership maintains that as a former member of the Investment LLCs, the agreement that "Members" and the

is expressly conditional upon the dispute(s) having been submitted to a non-binding dispute resolution process prior to any action being commenced in the Court of Chancery.

It is undisputed that the non-binding dispute resolution processes prescribed by the Operating Agreements had not been initiated, much less concluded, before Plaintiffs sued the Partnership.

Plaintiffs argued that the Partnership breached the provisions of the Operating Agreements by initiating arbitration with the Advisor pursuant to the IAA, and that the condition precedent to invoking the Court of Chancery's jurisdiction was thus effectively waived. That argument, however, rests on the presumption that the provisions of the Operating Agreements expressing the parties' agreement to submit to the Court of Chancery's jurisdiction prescribe the exclusive forum for binding resolution of disputes "arising under or in connection with the [Operating] Agreement." That presumption is unfounded. *See*, *Eisenbud*, 1996 WL 162245, at *1 ("absent clear language, a court will not interpret a forum selection clause to indicate the parties intended to make jurisdiction exclusive"), and *compare Prestancia Management Group, Inc.*, 2005 WL 1364616, at *6 – 7 (construing as an exclusive jurisdiction agreement a clause specifying that "the jurisdiction for any controversy arising [under the Security Agreement] shall be . . .") (emphasis supplied) with the text of the Operating Agreements in this case ("Members agree to submit to the jurisdiction of the

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"Manager" will submit to the jurisdiction of the Court of Chancery is no longer binding upon it.

Court of Chancery of the State of Delaware for resolution of any disputes arising under or in connection with the Agreement . . .").

The Partnership is uncertain whether the Court of Chancery's conclusion that it properly has personal jurisdiction over the Partnership rests on a determination that the Partnership waived or is estopped to rely on the express condition precedent to its agreement to submit to the Court of Chancery's jurisdiction for purposes of resolving disputes arising under or in connection with the Operating Agreements, or simply a determination that the exigencies of the case permitted the Court to exercise personal jurisdiction over the Partnership even where express conditions precedent to the Partnership's agreement to submit to the Court's jurisdiction have not been satisfied. *See* Tr. 40, lines 6 – 16. If the decision rests on the former proposition, the decision conflicts with the Eisenbud and Prestancia decisions, and thus meets the test of Rule 42(b)(i) because it meets the requirement of Supreme Court Rule 41(b)(ii). In all events, the Orders satisfy the test of Supreme Court Rule 41(b)((ii) because they uphold the controverted personal jurisdiction of the Court of Chancery.

2. The Decision That Jurisdiction To Determine The Arbitrability Of The Partnership's Disputes With The Advisor Pursuant To the IAA Resides With The Court of Chancery Rather Than The Arbitrators Upholds The Controverted Jurisdiction of the Court Of Chancery In A Way That Conflicts With Another Chancery Court Decision

And Relates To The Application Of The Uniform Arbitration Act In A Way That Has Not Been, But Should Be, Settled By The Supreme Court.

In the context of Plaintiffs' motion for a preliminary injunction against the arbitration initiated by the Partnership, the Court of Chancery held that it has subject matter jurisdiction to resolve the arbitrability of disputes between the Partnership and the Advisor pursuant to the IAA. That decision unquestionably upholds the controverted jurisdiction of the Court of Chancery. Accordingly, the Order satisfies the test of Supreme Court Rule 42(b)(ii). The decision did so in a way that both (a) conflicts with the decision in *Brown v. T Ink, LLC*, 2007 WL 4302594 (Del. Ch. Dec. 4, 2007), and (b) relates to the construction or application of 10 *Del. C.* §§5701 and 5703(b) in ways that have not been, but should be, settled by the Delaware Supreme Court.

In *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006), the Delaware Supreme Court held that where parties to a contract have agreed to arbitrate all of their disputes pursuant to the Commercial Arbitration Rules of the American Arbitration Association, that agreement constitutes clear and unmistakable evidence that the parties have agreed that issues of arbitrability are to be resolved by the arbitrator, not the courts. Here, the IAA sets forth the Partnership's and the Advisor's agreement that:

> Any controversy or claim arising out of or relating to this Agreement, or to the interpretation, breach or enforcement thereof, shall be settled by arbitration in accordance

> with the Commercial Arbitration Rules then in effect of the American Arbitration Association . . . .

In *Brown*, 2007 WL 4302594, at *10, the court implied that this form of arbitration clause is the type that would oust courts of subject matter jurisdiction to resolve disputes over arbitrability. Because the parties to that case used a different (and more restrictive) form of arbitration clause, the court held it retained jurisdiction over questions of arbitrability.

Despite the Partnership's and Advisor's agreement to a broad form arbitration clause in this case, the Court of Chancery stated that the Supreme Court's decision in *Willie Gary* is inapplicable. Tr. 39, line 10. It apparently concluded that the virtual identity between the above quoted arbitration clause and the standard AAA clause discussed in T-Ink was immaterial. The decision thus meets the test of Supr. Ct. R. 42(b)(i) because it meets the test of Supr. Ct. R. 41(b)(ii).

Since the issue of the Court's subject matter jurisdiction to decide arbitrability of disputes pursuant to the IAA's arbitration clause arose in the context of an action to enjoin an arbitration that was already instituted, Delaware's version of the Uniform Arbitration Act is implicated. 10 *Del. C.* §5703(b) provides that:

> a party who has not participated in the arbitration and who has not been made or served with an application to compel arbitration may file its complaint with the Court seeking to enjoin arbitration on the ground that a valid

> agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation of §5702(c).

10 *Del. C.* 5703(b) (emphasis supplied). In at least two prior cases, Delaware courts have stated that these are the only grounds upon which an arbitration proceeding may be enjoined. *Bailey v. Bender,* 1992 WL 113452 (Del. Ch. May 26, 1992); *Fritz v. Nationwide Mut. Ins. Co.*, 1990 WL 186448, at *2 (Del. Ch. Nov. 26, 1990).

Here, there is no doubt that in the IAA the Partnership and the Advisor made a valid agreement to arbitrate. No claim was made that the Partnership did not commence the arbitration in the manner prescribed by the arbitration clause of the IAA. Plaintiffs did not contend the claim submitted for arbitration is barred by 10 Del. C. §5702(c). The record of this case makes clear that the Advisor has participated in the arbitration it seeks to have enjoined, and also that none of the Investment LLCs are parties to the arbitration. Nevertheless, the Court of Chancery enjoined the arbitration based on its conclusion that the claims sought to be arbitrated pursuant to the IAA did not implicate duties undertaken by the Advisor pursuant to the IAA and were thus not arbitrable pwsuant to the IAA.

The Court of Chancery explained that it reached this conclusion because the obligations the Partnership sought to enforce are principally spelled out in the Investment LLCs' Operating Agreements. Tr. 34, lines 4 – 19. Several of the allegedly breached duties are explicitly articulated in those operating agreements. But where, as here, the IAA expressly contemplates that the Advisor will subcontract its investment

management responsibilities under the IAA to the Investment LLCs, and the Advisor manages the Investment LLCs to which it has subcontracted its duties under the IAA, reaching the conclusion that the Partnership cannot enforce pursuant to the IAA the obligations articulated in the operating agreements necessarily required the Court of Chancery to evaluate the merits of the Partnership's claims submitted for arbitration.

In 10 *Del. C.* §5701, the Delaware Legislature instructed the Court of Chancery that

> In determining any matter arising under this chapter, the Court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

The Court of Chancery has addressed in several decisions the question of whether the above quoted provisions of the Uniform Arbitration Act operate to limit the general equitable powers of the Court of Chancery when dealing with actions to enjoin arbitration proceedings. *See, e.g., Dresser Indus., Inc. v. Global Indus. Tech., Inc.*, 1999 WL 413401, at *4 (Del. Ch. June 9, 1999). The Supreme Court has not done so. The frequency with which the Delaware Courts are called upon to determine questions of arbitrability and the uncertainty that continues to surround the question of when they have jurisdiction to do so (*compare, e.g., Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149 (Del. 2002) with *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006) and *Brown*, 2007 WL 4302594)) strongly

suggests that the Supreme Court should now resolve that question.

For the foregoing reasons, insofar as the Orders upheld the jurisdiction of the Court of Chancery to determine the arbitrability of the Partnership's disputes with the Advisor, they meet the tests of Supreme Court Rule 42(b)(i) and (ii).

3. The Decision To Hear Plaintiffs' Claims For Declaratory Judgment Upholds The Controverted Subject Matter Jurisdiction Of The Court of Chancery.

In *Hampson v. State ex rel. Buckson*, 233 A.2d 155, 156 (Del. 1967), the Supreme Court recognized that "declaratory judgment actions [are] intended to provide a remedy where no other remedy is available under circumstances where an impending injury has not as yet occurred." (emphasis supplied). The Partnership moved to dismiss Plaintiffs' claims for declaratory relief because they were not brought for such purposes. Rather, Plaintiffs seek declaratory judgments exculpating Plaintiffs from liability to the Partnership for actions Plaintiffs took before they sued the Partnership. In denying the Partnership's motion to dismiss Plaintiffs' claims for declaratory relief based on the principle explained in *Hampson*, the Court of Chancery upheld its controverted jurisdiction, further satisfying the test of Supr. Ct. R. 42(b)(ii).

4. Interlocutory Review Of The Court Of Chancery's Orders May Terminate The Litigation And Will Otherwise Serve Considerations Of Justice.

If the Partnership prevails on its appeal from the Court of Chancery's Orders, this litigation will necessarily be terminated. It cannot proceed in the absence of personal and subject matter jurisdiction.

Interlocutory review of the Court of Chancery's Order will further serve considerations of justice. The Partnership contends that the claims it asserted against the Advisor in arbitration arise under or relate to the IAA. Pursuant to the IAA, the Partnership is obliged to assert any such claims in arbitration, and the Advisor is obliged to submit to their resolution through arbitration. Further, by agreeing that their disputes would be arbitrated pursuant to the Commercial Arbitration Rules of the American Arbitration Association, the Advisor and the Partnership created clear and unmistakable evidence that they intended the arbitrators, not the courts, to decide questions of arbitrability.

Interlocutory review of the Court of Chancery's Order is now the only means available to the Partnership to vindicate meaningfully its right to arbitration of disputes – including disputes over arbitrability – pursuant to the IAA. In the absence of such review, the Partnership will have to decide whether to (a) assert as counterclaims in this action the claims it asserted against the Advisor in arbitration, and (b) assert in the first instance (as counterclaims) claims the Partnership has against the Investment LLCs, or (c) assume a risk that its claims

against Plaintiffs might be foreclosed by a final judgment in this case. Even though the Partnership is the only party arguably injured by Plaintiffs' actions, it will thus be effectively deprived of the ability to control when and against whom it asserts claims arising from its injuries. To the same extent that arbitrating disputes that should be litigated poses a risk of immediate and irreparable harm to Plaintiffs, litigating disputes the Partnership and Advisor agreed would be arbitrated poses a risk of immediate and irreparable harm to the Partnership.

In these circumstances, the test of Rule 42(b)(v) is also satisfied.

CONCLUSION

The Court of Chancery's Order denying the Partnership's motion to dismiss and enjoining the Partnership from pursuing the arbitration it commenced with the Advisor satisfy the requirements for interlocutory review established by Supreme Court Rule 42(b). The jurisdictional issues resolved through these rulings overlap extensively. The Partnership has a statutory right, independently of Supreme Court Rule 42(b), to appeal from the Order sustaining the motion for a preliminary injunction against the arbitration proceeding. Under these circumstances, both aspects of the Order should be certified and accepted for interlocutory appeal.

/s/ Daniel A. Dreisbach (#2583)
Daniel A. Dreisbach (#2583)
Richards, Layton & Finger, P.A.
One Rodney Square
P.O. Box 551

Wilmington, Delaware 19899
(302) 651-7700
Attorneys for Defendant The
Bander Family Partnership

OF COUNSEL:

Kenton E. Knickmeyer
Thompson Coburn LLP
One US Bank Plaza
St. Louis, Missouri 63101-1693
(314) 552-6000

Dated: September 17, 2008

EXHIBITS 1-3

Efiled: Sep 17 2008 3:32PM EDT
Transaction ID 21571942
Case No. 3830-VCS

EXHIBIT 1

CAPITAL PRIVATE WEALTH MANAGEMENT INVESTMENT ADVISORY AGREEMENT

THIS AGREEMENT is entered into this 23rd day of March, 2005, between The Bander Family Partnership, L.P. ("Client") and Capital Private Wealth Management, LLC ("CPWM").

1. Client hereby appoints CPWM to provide investment advisory services with respect to Client's account (the "Account(s)") taking into account Client's investment objectives, means and risk tolerance. The Account(s) shall consist of cash, stocks, bonds and other securities placed under management of CPWM by Client, a current list of which Client has provided to CPWM. Additional securities and funds may from time to time be placed under management pursuant to the terms of this Agreement. Client agrees to keep CPWM informed on a current basis of all additions to and withdrawals from the Account(s) to insure proper management.

CPWM shall select from time to time one or more investment managers ("Investment Manager(s)") to provide investment advice with respect to the Account(s). Initially, CPWM will select one or more Investment Managers in Schedule I or Schedule II, incorporated herein by reference. Any changes to the

initial Investment Manager selection(s), including adding an Investment Manager, deleting an Investment Manager previously selected, or changing the amount allocated to any selected Investment Manager shall be made by CPWM in writing to Client.

CPWM has entered into an agreement with the Investment Managers in Schedule I pursuant to which the Investment Manager will provide day-to-day investment services to Client. Any Investment Manager in Schedule II that is chosen by CPWM to manage assets in Client's Account(s) will enter into a separate agreement with Client to provide day-to-day investment services to Client. Each Investment Manager chosen to manage Client's Account(s), as set forth in Schedule I and II attached hereto, will invest and reinvest the securities, cash and/or other investments held in the Account(s) and engage in such transactions on Client's behalf as each Investment Manager may deem appropriate, at the Investment Manager's discretion, subject to the Investment Guidelines that have been provided to Client. Client may amend such Investment Guidelines and such amendments will be effective for the Account(s) once Client receives a signed acknowledgment from CPWM. Client understands that, in making changes to the Investment Guidelines, it is necessary to allow sufficient time for each Investment Manager to implement the changes. The Client acknowledges receipt of the Investment Guidelines.

While CPWM may guide a Client regarding the assets to be managed by an individual Investment Manager, Client assumes responsibility for ensuring that Client's assets, viewed in their entirety, are sufficiently diversified. Client also assumes

responsibility for any allocation of assets among different Investment Managers.

2. The assets of the Account shall be held in the custody of a bank, trust company or brokerage firm selected by CPWM. CPWM shall not take custody or possession of any cash or securities of Client.

3. Except as otherwise separately agreed in writing and except with respect to the selection of an Investment Manager, CPWM shall have no discretionary authority with respect to investments. Client hereby grants each Investment Manager that CPWM has selected in Schedule I or II complete and unlimited discretionary trading authorization, and appoints each Investment Manager as an agent and attorney-in-fact with respect to the assets in the Account(s) to be managed by the Investment Manager as disclosed in the descriptive profile for each Investment Manager. Pursuant to such authorization, each Investment Manager may, in its discretion and at Client's risk, purchase, sell, exchange, convert and otherwise trade in the securities and other investments in the Account(s) designated for its management, as well as arrange for delivery and payment in connection with the above. Client grants each Investment Manager full authorization to issue such instructions to and engage in such transactions with the custodian as may be appropriate in connection with the management of the respective Account(s). Client authorizes CPWM to act on behalf of Client in all matters necessary or incidental to the handling of the Account(s). This trading authorization is continuing and shall remain in full force and effect until terminated in writing by Client or CPWM. The

termination of this authorization will constitute a termination of this Agreement upon receipt by CPWM.

4. Client acknowledges that circumstances may arise under which an Investment Manager determines that, while it would be both desirable and suitable that a particular security or other investment be purchased or sold for the Account of more than one of the Investment Manager's Clients, there is a limited supply or demand for the security or other investment. Under such circumstances, Client acknowledges that while the Investment Manager will seek to allocate the opportunity to purchase or sell that security or other investment among those accounts on an equitable basis, the Investment Manager shall not be required to assure equality of treatment among all of its Clients (including that the opportunity to purchase or sell that security or other investment will be proportionally allocated among those Clients according to any particular or predetermined standards or criteria).

In certain instances, an Investment Manager may place a large order to purchase or sell a particular security or other investment for the Account(s) of one or more other Clients. Because of prevailing market conditions, it frequently is not possible ro receive the same price or time of execution for all of the securities or other investments purchased or sold. When this occurs, an Investment Manager may average the various prices and charge or credit Client with the average price. In such instances, the confirmation for the transaction sent to the Client will disclose the average price.

5. CPWM shall periodically review the Account(s) to the same extent and with the same frequency as is

the practice of CPWM with respect to similar accounts managed by it and shall periodically make recommendations with respect to sales, changes in investments and the investment of uninvested funds as it may deem advisable. CPWM shall designate one individual as the Account Representative who shall be regularly available to Client to discuss the Account(s) as well as an alternative individual who shall be available to Client when the primary Account Representative is not available.

6. CPWM shall provide Client with monthly statements which will reflect estimated market values in the Account(s) during such time periods. On a quarterly basis, more detailed information about all Client's accounts and Investment Managers will be available for review. An annual report will be provided to Client listing all transactions of the previous year.

7. Client agrees to keep all investment advice provided by CPWM confidential and to use such advice only with respect to the Account(s) under management. CPWM shall keep all information concerning the Account(s) confidential.

8. It is understood that investment recommendations with respect to the Account(s) may differ from those made or recommended with respect to other accounts, even though the investment objectives may be the same or similar. It is understood that the investment information used is obtained from various sources such as institutional research firms, corporate annual reports, financial periodicals and other sources, which sources are believed to be reliable; however, the accuracy of such sources cannot be guaranteed.

9. For its services, beginning with the effective date of this Agreement, Client agrees to pay CPWM, in advance, a monthly fee based upon the market value of the Account(s) at the beginning of the term of this Agreement and at the end of each month in accordance with the fee schedule, attached hereto as Schedule III and incorporated herein by reference. Such fee shall be prorated for any fractional period at the beginning or end of the term of this Agreement. For purposes of calculating fees, any securities or investments in the Account(s) shall be valued in such a manner us each Investment Manager reasonably determines reflects fair market value the Account(s). Publicly traded securities shall be valued at their quoted values and securities which are not publicly traded shall be valued at fair market value determined in good faith. A valuation is not a guarantee of any kind with respect to the value of the assets of the Account(s).

10. It is expressly understood and agreed between the parties to this Agreement that CPWM is not qualified to render any legal or accounting advice or to prepare any accounting or legal documents for the implementation of the Client's plans. The Client agrees that his or her personal attorney and accountant shall be solely responsible for the rendering and/or preparation of all of the following: (i) legal advice; (ii) legal opinions; (iii) determinations; (iv) legal documents; (v) tax returns; and (vi) accounting statements and documents. The Client shall be solely responsible for any costs accrued with respect to preparation or implementation of any of the above.

11. In connection with any advisory services being provided to Client, CPWM and each Investment

Manager selected are entitled to rely on the financial and other information provided by Client, Client agrees to inform CPWM promptly in writing of any material change in Client's circumstances that might affect the manner in which Client's assets should be invested and to provide CPWM with such other information as it shall reasonably request.

12. CPWM represents that it is registered as an investment advisor under the Investment Advisers Act of 1940 and subject to, and will act in conformity with, all applicable laws and regulations under federal or state law and the standards of care set forth therein. It is understood that CPWM is acting in an advisory capacity and that CPWM shall not be liable to the Client for any action taken by CPWM in good faith not involving negligence, malfeasance or willful violation of applicable law. Neither CPWM, the Investment Manager(s) nor any of their respective officers, directors or employees shall be responsible hereunder for any action performed or omitted to be performed in good faith, or for any errors in judgment in managing the Account(s). Client acknowledges that neither CPWM nor the Investment Manager(s) warrant the rate of return on or the market value of the investments in the Account(s). Neither CPWM, the Investment Manager(s) nor their respective officers, directors or employees shall be responsible for any loss incurred by reason of any act or omission of any broker, dealer or custodian; provided, however, that CPWM and the Investment Manager(s) will make reasonable efforts to require that broker-dealers perform their obligations with respect to the Account(s). It is understood that nothing herein shall in any way constitute a waiver or limitation of any of the obligations which CPWM or the Investment

Manager(s) may have under federal and state securities or other laws.

13. The Client acknowledges receipt of CPWM's disclosure statement more then 48 hours prior to the time of execution of the Agreement.

14. CPWM does not assume the responsibility for any Investment Manager's day-to-day investment decisions, performance, compliance with applicable laws or regulations or other matters within the Investment Manager's control.

15. Client hereby appoints and designates as its agent CPWM to receive and vote the proxies or to take action regarding legal notices with respect to securities or other investments held in the Account(s). CPWM may elect to delegate this responsibility to a third party, such as an Investment Manager where appropriate. Client holds CPWM or such third parties harmless from any claim associated with its delegation of this authority. Nothing herein waives any rights that the Client may have under applicable rules or law. Client understands that its designation of CPWM as its agent to receive and vote proxies or to take action regarding legal notices can be rescinded at anytime by sending a written notice of such rescission to CPWM.

16. This Agreement may not be amended except by a writing signed by the parties hereto, and may be terminated at my time by either party upon written notice to the other. This Agreement may not be assigned by CPWM without Client's written consent.

17. Any controversy or claim arising out of or relating to this Agreement, or to the interpretation, breach or enforcement thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association and judgment upon the award rendered may be entered in any court having jurisdiction thereover.

18. This Agreement shall be governed by the laws of the State of Missouri without reference to its conflicts or choice of laws principle, except where such laws are preempted by Federal law, in which case Federal law shall govern.

19. This Agreement shall be executed in dual counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date first above written.

THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

CAPITAL PRIVATE WEALTH MANAGEMENT, LLC
By: /s/_____
Title: Managing Director

THE BANDER FAMILY PARTNERSHIP, L.P.
/s/ Patricia A. Bander
Signature
Patricia A. Bander
Print Name

Member, PAB Management LLC - General Partner
Title

CAPITAL PRIVATE WEALTH MANAGEMENT
INVESTMENT ADVISORY AGREEMENT

SCHEDULE I

STRATEGY	*MANAGER*
Newport Net Performance, LLC Series A - Large Cap	Dodge & Cox - Stock Fund (Value) OakBrook Investments - Select Equity (Core) Trust Company of the West - Large Cap Core Equity (Growth)
Newport Net Performance, LLC Series B - Small Company	Advisory Research - Small Cap Value Lee Munder Investments - Small Cap Value IronBridge Capital Management - Small Cap Core Sterling Johnston Capital - Micro-Cap Aggressive Growth
CPW International Equities, LLC	Sanderson - International Equity (Value) Julius Baer - International Equity (Core)

STRATEGY	*MANAGER*
	NewStar - International Equity (Growth)
CPW Stock Selection, LLC Long/Short Equity Fund	SuNova Capital Third Point Millennium Stadia Capital Blackmore Wallace Clovis Capital Heirloom Capital Management Arience Capital Trivium Capital Management Iron Horse Capital Management Alydar Highline Capital Bennett Lawrence (Salus) Mako Cantillon

STRATEGY	*MANAGER*
	Cutter Point Force Capital Hayground Cove Lazard European Phinity
Large Cap Core - Tax Advantaged	Parametric Portfolio Associates

CAPITAL PRIVATE WEALTH MANAGEMENT
INVESTMENT ADVISORY AGREEMENT

SCHEDULE II

STRATEGY	*MANAGER*
Cash Management	Sage Advisory
Fixed Income - Municipal Core	Sage Advisory
Fixed Income - Other	tbd
Real Estate	tbd
Private Equity/ Venture Capital	tbd

CAPITAL PRIVATE WEALTH MANAGEMENT
INVESTMENT ADVISORY AGREEMENT

SCHEDULE III

Client shall pay CPWM a fee of 50 basis points (0.50%) applied to the total market value of Client's assets under management with CPWM.

CPWM will bill Client quarterly in arrears. Each quarterly fee will be for 25% of the total annual fee herein. Any work done during a partial calendar quarter shall be billed on a pro-rata basis. The annual fee shall include all expenses incurred by CPWM in performance of its services, and accordingly, Client will not be obligated to pay expense reimbursements to CPWM relating to routine out-of-pocket expenses. In the event this Agreement is terminated as of a day which is not the last day of a calender quarter, then the payment for the quarter in which such termination occurs shall be prorated for the number of days this agreement was in effect during such quarter. All payments shall be due within thirty days after the end of the calendar quarter, and shall be based upon the total estimated market value of Client's assets under management with CPWM.

Initial: PB
Date: 3/23/05

CPWM

CAPITAL PRIVATE WEALTH MANAGEMENT

March 22, 2005

The Bander Family Partnership, L.P.
12909 Des Peres Woods Drive
St. Louis, MO 63131
Attn: Patricia A. Bander, Member, PAB Management, LLC -- General Partner

Dear Ms. Bander:

You have requested that we amend that certain Investment Advisory Agreement entered into by Capital Private Wealth Management, LLC ("CPWM") and The Bander Family Partnership, L.P. (the "Partnership") dated 3/23, 2005 (the "Agreement") to provide for certain exceptions to the arbitration provision contained in Section 17 thereof.

Accordingly, we have agreed that notwithstanding anything contained in Section 17 of the Agreement to the contrary, the Partnership, its beneficiaries and any partner acting on behalf of the Partnership shall have the option to bring a legal cause of action in St. Louis County or Federal Court in the Eastern District of Missouri only in the event the partner of the Partnership has a reasonable basis for asserting that CPWM has committed Misappropriation or Theft (each as hereinafter defined). For purposes of this letter, the term "Misappropriation" shall mean the unlawful use of the Partnership's funds in a manner which fails to benefit the Partnership. For purposes of this letter, the term "Theft" shall mean an act by CPWM intended to deprive the Partnership permanently of funds

entrusted to CPWM and which results in the permanent deprivation of such funds.

Notwithstanding the foregoing, neither the Partnership, any beneficiary of the Partnership nor any partner acting on behalf of the Partnership shall be entitled to bring a legal cause of action hereunder until CPWM has been given written notice of the potential cause of action and a ninety (90) day period to cure any circumstance giving rise to such cause of action and to reimburse any damages arising thereunder.

Except as amended and modified hereby, the terms of the Agreement remain in full force and effect.

If you are in agreement with the foregoing, please execute where indicated below.

CAPITAL PRIVATE WEALTH MANAGEMENT, LLC

By: /s/ R.D. Todd Baur
Name: R.D. Todd Baur
Title: Managing Director

THE STEVEN J. BANDER FAMILY PARTNERSHIP
/s/ Patricia A. Bander
Signature

Patricia A. Bander
Print Name

Member, PAB Management, LLC – General Partner
Title

Date: 3/23/05

EXHIBIT 2

American Arbitration Association
Dispute Resolution Services Worldwide

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

MEDIATION: If you would like the AAA to contact the other parties and attempt to arrange a mediation, please check this box. ❑ *There is no additional administrative fee for this service.*		
Name of Respondent: TowerHill Wealth Management LLC		
Address 9640 Clayton Road		
City St. Louis	State MO	Zip Code 63124-
Phone No. 314-725-6300	Fax No. 314-727-0098	
Email Address:		
Name of Representative (if known) Patrick Stark (Registered Agent)		
Name of Firm (if applicable)		
Representative's Address 3117 S. Big Bend		

City St. Louis	State MO	Zip Code 63143-
Phone No.	Fax No.	
Email Address:		
The named claimant, a party to an arbitration agreement dated March 23, 2005, which provides for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration.		
THE NATURE OF THE DISPUTE Refusal to return to investment advisory client funds belonging to client upon termination of investment advisory relationship; refusal to properly account for client's investments		
Dollar Amount of Claim $2,000,00.00	Other Relief Sought: ☒ Attorney Fees ☒ Interest ☒ Arbitration Costs ☐ Punitive/Exemplary ☐ Other	
AMOUNT OF FILING FEE ENCLOSED WITH THIS DEMAND (please refer to the fee schedule in the rules for the appropriate fee) $8,000.00		
PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE: Familiarity with Investment Advisors' Duties, Financial Transactions		

Hearing locale St. Louis, Missouri (check one) □ Requested by Claimant □ Locale provision included in the contract	
Estimated time needed for hearings overall: ___ hours or 2 days	Type of Business: Claimant Family Limited Partnership Respondent Investment Advisor
Is this a dispute between a business and a consumer? □ Yes □ No Does this dispute arise out of an employment relationship? □ Yes □ No If this dispute arises out of an employment relationship, what was/is the employee's annual wage range? Note: This question is required by California law. □ Less than $100,000 □ $100,000 - $250,000 □ Over $250,000	
You are hereby notified that copies of our arbitration agreement and this demand are being filed with the American Arbitration Association's Case Management Center, located in (check one) □ Atlanta, GA □ Dallas, TX □ East Providence, RI □ Fresno, CA □ International Centre, NY, with a request that it commence administration of the arbitration. Under the rules, you may file an answering statement within fifteen days after notice from the AAA.	
Signature (may be signed by a representative) /s/ Date: 6/2/08	
Name of Claimant The Bander Family Partnership, LP	

Address (to be used in connection with this case) 12909 Des Peres Woods Drive		
City St. Louis	State MO	Zip Code 63131-
Phone No. 314-821-0591	Fax No. 314-909-0135	
Email Address: sbander@swbell.net		
Name of Representative Kenton E. Knickmeyer		
Name of Firm (if applicable) Thompson Coburn LLP		
Representative's Address One US Bank Plaza		
City St. Louis	State MO	Zip Code 63101-
Phone No. 314-552-6064	Fax No. 314-552-7064	
Email Address: kknickmeyer@thompsoncoburn.com		
To begin proceedings, please send two copies of this Demand and the Arbitration Agreement, along with the filing fee as provided for in the Rules, to the AAA. Send the original Demand to the Respondent.		
Please visit our website at www.adr.org if you would like to file this case online. AAA Customer Service can be reached at 800-778-7879		

IN ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF ARBITRATION BETWEEN	)
The BANDER FAMILY PARTNERSHIP, L.P., Claimant,	)
And	)
TOWERHILL WEALTH MANAGEMENT, L.L.C, Respondent.	)

DEMAND FOR ARBITRATION AND STATEMENT OF CLAIM

I. Demand for Arbitration And Request for Expedited Treatment Or, Alternatively, For Interim As Well As Final Relief

Claimant, The Bander Family Partnership, L.P. (The "Bander Family") demands arbitration in St. Louis, Missouri of its dispute described below with Respondent, TowerHill Wealth Management, LLC, a registered investment advisor (the "Advisor").

This dispute arises, in the first instance, from a terminated investment advisor's unreasonable and unconscionable delay of the delivery to its (former) client of substantial sums of money (formerly) entrusted to the investment advisor's management.

Specifically, the Advisor presently retains control of at least One Million Eight Hundred Seventy-Two Thousand One Hundred Sixty-One Dollars and Sixty-Seven Cents ($1,872,161.67) in cash belonging to the Bander Family and is wrongfully refusing to cause that cash to be paid immediately to the Bander Family, which is entitled to the immediate use of this substantial sum of money, as well as other relief, including interest on the withheld funds and an accounting.

The Advisor's motive for this misconduct is uncertain – it may be a vindictive act intended to harm the Bander Family or its new investment advisor (an entity organized by former investment advisor representatives of the Advisor) or an act intended to benefit unfairly the Advisor and/or its continuing clients by enabling one or more of them to use the Bander Family's money for as long as possible. Alternatively, the Advisor may have actually misappropriated the funds in question.

The consequences of the Advisor's misconduct, however, are clear: the Bander Family is being deprived of investment opportunities because the Advisor is blocking the Bander Family's access to its money, and the Advisor and/or its continuing clients is/are being unjustly enriched through the Advisor's improper, continuing exercise of control over the Bander Family's money.

To remedy, in part, the continuing harm being inflicted on the Bander Family by Advisor's actions in refusing to cause the Bander Family's money to be paid to it, the Bander Family requests that the proceedings in this matter be conducted so as to

expeditiously resolve the Bander Family's right to the immediate turnover of its money, either by application of Rules E-1 to E-10 of the Commercial Arbitration Rules to this case, or by providing for an early hearing leading to an interim award resolving that right.

II. Statement of Claim

For its Statement of Claim, the Bander Family, states as follows:

A. The Parties

1. The Bander Family is a limited partnership organized under the laws of Missouri. Its managing partner is Patricia Bander. Its address and only place of business are within the State of Missouri in the St. Louis metropolitan area. Its purposes include investment of the partnership's funds for the benefit of members of the partnership.

2. The Advisor is a Delaware limited liability company. It is registered with the United States Securities and Exchange Commission as an investment advisor. Formerly, the Advisor was known as Capital Private Wealth Management, LLC. The Advisor's offices and principal place of business are located in St. Louis County, Missouri.

B. The Parties' Relationship and Their Agreement to Resolve Disputes Through Arbitration

3. By Agreement dated March 23, 2005, a copy of which is annexed hereto as Exhibit I (the "Agreement"), the Bander Family contracted with

Advisor to receive investment advisory services from the Advisor. In consideration of those services, the Bander Family paid the Advisor a fee calculated at the annual rate of ½% of the value of the Bander Family's assets under management by the Advisor.

Pursuant to the Agreement, Advisor promised, among other things,

a. to select from time to time one or more investment managers to provide investment advice with respect to the Bander Family's accounts;

b. to select a custodian to maintain custody of the Bander Family's investments;

c. to provide the Bander Family with monthly statements reflecting estimated market values in the Bander Family's accounts, on a quarterly basis, more detailed information about the accounts, and annually a report listing all transactions of the previous year.

Additionally, the parties agreed in Paragraph 17 of the Agreement that:

> Any controversy or claim arising out of or relating to this Agreement, or to the interpretation, breach or enforcement thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association and judgment upon the award rendered may be entered in any court having jurisdiction thereover.

4. By reason of the Agreement, and in accordance with Section 206 of the Investment Advisors Act of 1940, 15 U.S.C. §80b-6, the Advisor became a fiduciary to the Bander Family. *See, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-192 (1963).

5. In addition to the duties specified in the Agreement, the Advisor, as a fiduciary to the Bander Family, owed the Bander Family the following duties (among others): (a) to at all times act in the best interests of the Bander Family and to put the Bander Family's interests ahead of the interests of the Advisor; (b) to not favor the interests of any other clients – e.g., those clients who are continuing to use the Advisor's investment advisory services – over the interests of the Bander Family; and (c) to make full and fair disclosure of all material facts to the Bander Family.

Further, pursuant to the Investment Advisors Act and regulations promulgated pursuant thereto (SEC Rule 206(4)-2, 17 C.F.R. §275.206(4)-2), the Advisor was required to obtain (and deliver to the Bander Family) audited financial statements for each Investment LLC (defined below) within 120 days of December 31, 2007, unless, with respect to any individual Investment LLC, 10% or more of that entities' investments, by value, are in shares of investment companies or other investment funds not managed by the Advisor or persons related to the Advisor. In the case of Investment LLC's meeting the requirements of this exception, the audits are required to be concluded and delivered to the Bander Family within 180 days of December 31, 2007.

6. After entering into the Agreement with the Advisor, and pursuant thereto, the Bander Family entrusted Advisor with the decisions on how to invest approximately $26.6 million belonging to it.

7. Upon Advisor's advice, approximately $12.8 million of the approximately $26.6 million in Bander Family funds committed to the investment advice of Advisor were invested by purchasing membership interests in three limited liability companies organized and controlled by the Advisor. At the times of these investments, the companies were known as Capital Private Wealth Stock Selection, LLC, Newport Net Performance LLC and CPW International Equities, LLC (collectively, the "Investment LLCs"). Subsequent to the investment of the Bander Family's money in membership interests in the Investment LLCs, and more or less contemporaneously with the Advisor's change of its name from Capital Private Wealth Management, LLC to TowerHill Wealth Management, LLC, each Investment LLC's name was changed. Capital Private Wealth Stock Selection, LLC was renamed TowerHill Long/Short Equity, LLC. Newport Net Performance, LLC was renamed TowerHill US Equities, LLC. CPW International Equities, LLC was renamed TowerHill International Equities, LLC.

8. Pursuant to the Operating Agreement of each Investment LLC, the Advisor is the Manager of each Investment LLC.

9. Under the direction of the Advisor, the Bander Family's money used to purchase membership interests in each Investment LLC (along with the money of other clients of the Advisor who also purchased membership interests in the Investment

LLC), was entrusted to the investment management of other investment advisors selected by the Advisor. Such entrustment occurred either directly, by the Investment LLC engaging directly the services of other investment advisors, or indirectly, when the Advisor caused the Investment LLC's to purchase shares or other interests in investment companies and/or investment funds commonly described as hedge funds.

10. Each Investment LLC's Operating Agreement permits members to withdraw all or part of their investments on "Valuation Dates". The Valuation Dates occur, at a minimum, on the last day of each calendar quarter. Withdrawals, sometimes referred to as "redemptions" are effected by written notice to the Manager (i.e., the Advisor) delivered not less than 30 days in advance of the Valuation Date.

11. The TowerHill Long/Short Equity LLC Operating Agreement provides that "Ninety percent (90%) of the Redemption Value shall be paid as soon as reasonably practicable but in any event no later than the thirtieth business day after the applicable Valuation Date. The remaining ten percent (10%) of the Redemption Value shall be paid as soon as reasonably practicable but in any event upon completion of the next Audit, and shall be made net of expenses to the Company incurred by the Company in connection with such redemption".

12. Likewise, the TowerHill International Equity LLC Operating Agreement provides that "Ninety percent (90%) of the Redemption Value shall be paid as soon as reasonably practicable but in any event no later than the thirtieth business day after the applicable Valuation Date. The remaining ten percent

(10%) of the Redemption Value shall be paid as soon as reasonably practicable but in any event upon completion of the next Audit, and shall be made net of expenses to the Company incurred by the Company in connection with such redemption."

13. The Operating Agreement of TowerHill US Equities, LLC includes a similar provision, but the phrase "as soon as reasonably practicable" does not appear in the provision of that Operating Agreement governing redemptions. The TowerHill US Equities, LLC Operating Agreement specifies only the latest dates by which 90% and 10% of the Redemption Value of a member's interest shall be paid.

14. In 2007, the Bander Family learned that members of the team of individuals associated with the Advisor who had been managing and advising the Bander Family on its investments were leaving the Advisor. At least one of those individuals became an investment advisor representative of a newly organized investment advisor, Essex Ridge Capital.[1]

15. The Bander Family decided to, sever its own relationship with the Advisor. Separately, after a manager search, the Bander Family decided to and did engage the investment advisory services of Essex Ridge Capital.[2]

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[1] Essex Ridge Capital was organized by several individuals formerly associated in various capacities with TowerHill Wealth Management, LLC.

[2] The Bander Family and its representatives have been informed by various persons, including counsel for the Advisor, that a number of other clients of the Advisor similarly terminated their

16. In connection with the termination decision, the Bander Family gave written notice to the Advisor that the Bander Family would redeem its interest in each Investment LLC effective December 31, 2007. Each notice was delivered to the Advisor more than 30 days prior to December 31, 2007, and acknowledged by the Advisor. Copies of each notice and each acknowledgement are appended as Exhibits 2 - 7. In order to effect such redemptions, it was necessary for the Advisor to cause the Investment LLCs to sell various securities.

C. Advisor's Actions Giving Rise to This Dispute

17. Based on communications between representatives of the Bander Family and employees/agents of the Advisor and the custodian, and confirmed, as to the TowerHill US Equities LLC by the audited financial statements recently furnished to the Bander Family, the Bander Family is informed and believes, and therefore alleges, that on or before December 31, 2007, each Investment LLC had liquidated sufficient investments to generate the cash needed to fully redeem the Bander Family's interests in the Investment LLC, along with the interests of all other concurrently redeeming members of the Investment LLC. Further, the resulting cash proceeds were within and subject to the direction and control of Advisor from and after December 31, 2007.

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relationships with the Advisor and the Investment LLCs at approximately the same time as the Bander Family, and at least some of those (now former) clients of the Advisor engaged Essex Ridge Capital as their new investment advisor.

18. The Bander Family is also informed and believes, based upon the same sources of information, and therefore alleges that (a) on or before December 31, 2007, the Advisor knew what fees and expenses, if any, had been incurred by each Investment LLC in connection with the redemptions scheduled to be effective on December 31, 2007, and (b) on or before January 2, 2007, the Advisor had full valuation information for each Investment LLC's continuing investments as of the December 31, 2007 Valuation Date.

19. With the information described in paragraphs 17 and 18, above, by January 2, 2007 it was reasonably practicable for the Advisor to calculate and to cause the Bander Family to be paid both (a) 90% of the Redemption Value of the Bander Family's interest in each Investment LLC and (b) the remaining 10% of the Redemption Value of the Bander Family's interest in each Investment LLC.

20. The Advisor failed and refused to do so.

21. Although obliged by the Agreement, by the terms of each Investment LLC's Operating Agreement, and by the applicable securities laws to provide monthly, quarterly and annual reports to the Bander Family from which the Bander Family could ascertain (a) current values of its investment interests, (b) the transactions that were being executed, directly or indirectly, for the Bander Family's accounts, and (c) the fees and expenses directly and indirectly incurred by the Bander Family in respect of its investments (including the liquidation or redemption of its investments), the Advisor has failed and refused to do

so since receiving the notices, copies of which are appended hereto as Exhibits 2, 4 and 6.

22. In general, the Advisor provided the Bander Family with monthly statements in the form annexed hereto as Exhibit 8.

23. In January, 2008, the Advisor (initially) refused to provide the Bander Family with any information about the value of its investments in any of the Investment LLC's as of December 31, 2007. Instead, the Advisor furnished the Bander Family with a statement, a true and correct copy of which is annexed as Exhibit 9. As the Panel can see, Exhibit 9 omitted any information about any of the Investment LLC's.

24. Upon the Bander Family's protest to agents of the Advisor, one of the Advisor's agents furnished the Bander Family with a statement, a copy of which is annexed as Exhibit 10.

25. When the Bander Family asked the Advisor (a) when payments would be made of the Redemption Values would be made, (b) whether those payments would include interest on the funds for the periods after the cash had come into the control of the Advisor (following liquidation of the Investment LLC's investments needed to make the distributions) and (c) what, if any, fees and expenses of liquidation were incurred and would be assessed to the Bander Family, the Advisor refused to provide any concrete information, but suggested that the fees associated with the liquidation would equal or exceed any interest that might have accrued on the Bander Family's cash while controlled by the Advisor.

26. The Bander Family thereafter directed to the Advisor a formal request for accounting information (Ex. 11, annexed hereto), and a further, formal request for payments in respect of its interests in each Investment LLC (Exhibit 12, annexed hereto).

27. In response to these requests, the Advisor (a) insisted that the Bander Family enter into a confidentiality agreement with the Advisor before the Advisor would release any documents or information to the Bander Family or its representatives, (b) upon receipt of the requested confidentiality agreement, furnished the Bander Family only with copies of documents the Advisor reasonably believed were already possessed by the Bander Family, and (c) refused to make any of the requested payments.

28. Prior to the further, formal request for payments annexed as Exhibit 12, and on or about January 24, 2008, the Advisor caused the Bander Family to be paid $6,221,260, reportedly representing 90% of the December 31, 2007 value of the Bander Family's interest in TowerHill US Equities, LLC.

29. TowerHill US Equities, LLC has received audited financial statements for the year ended December 31, 2007. Those statements suggest that TowerHill US Equities, LLC held cash on December 31, 2007 in an amount at least sufficient to pay all members (including the Bander Family) who are redeeming their interests as of December 31, 2007 100% of the Redemption Values of their interests.

30. Nevertheless, the Advisor has failed and refused (a) to pay to the Bander Family the remaining 10% of the reported Redemption Value of its interest

in TowerHill US Equities, LLC, (b) to account to the Bander Family for the investment activity TowerHill US Equities, LLC engaged in (directly or indirectly) for the Bander Family's account in conformity with (i) the Agreement, (ii) the LLC's Operating Agreement, (iii) the requirements of the securities laws, or (iii) the Bander Family's reasonable, written request for such an accounting embodied in Ex. 10, (c) to account to the Bander Family for the handling and use (under the direction and control of the Advisor) of the cash held to pay the Redemption Value of the Bander Family's interest in the LLC, or (d) to pay over to the Bander Family any interest earned in respect of the cash held from and after December 31, 2007 to pay the Bander Family the Redemption Value of its membership interest in the LLC.

31. On or about February 8, 2008, the Advisor caused the Bander Family to be paid $5,909,350.60, reportedly representing 90% of the December 31, 2007 value of the Bander Family's interest in TowerHill International Equities, LLC.

32. The Advisor has failed and refused (a) to pay to the Bander Family the remaining 10% of the reported Redemption Value of its interest in TowerHill International Equities, LLC, (b) to account to the Bander Family for the investment activity TowerHill International Equities, LLC engaged in (directly or indirectly) for the Bander Family's account in conformity with (i) the Agreement, (ii) the LLC's Operating Agreement, (iii) the requirements of the securities laws, or (iii) the Bander Family's reasonable, written request for such an accounting embodied in Ex. 10, (c) to account to the Bander Family for the handling and use (under the direction and control of

the Advisor) of the cash held to pay the Redemption Value of the Bander Family's interest in the LLC, or (d) to pay the Bander Family interest on the cash held from and after December 31, 2007 to pay the Bander Family the Redemption Value of its membership interest in the LLC.

33. On or about February 11, 2008, the Advisor caused the Bander Family to be paid $4,718,843.91, reportedly representing 90% of the December 31, 2007 value of the Bander Family's interest in TowerHill Long/Short Equities, LLC.

34. The Advisor has failed and refused (a) to pay to the Bander Family the remaining 10% of the reported Redemption Value of its interest in TowerHill Long/Short Equities, LLC, (b) to account to the Bander Family for the investment activity TowerHill Long/Short Equities, LLC engaged in (directly or indirectly) for the Bander Family's account in conformity with (i) the Agreement, (ii) the LLC's Operating Agreement, (iii) the requirements of the securities laws, or (iii) the Bander Family's reasonable, written request for such an accounting embodied in Ex. 10, (c) to account to the Bander Family for the handling and use (under the direction and control of the Advisor) of the cash held to pay the Redemption Value of the Bander Family's interest in the LLC, or (d) to pay the Bander Family interest on the cash held from and after December 31, 2007 to pay the Bander Family the Redemption Value of its membership interest in the LLC.

35. By reason of the foregoing, the Advisor has breached its fiduciary duties to the Bander Family.

36. Further, by reason of the foregoing, the Advisor has perpetrated an actual or constructive fraud upon the Bander Family (a) in connection with the sale of securities, and (b) in connection with providing investment advice for which consideration was received by the Advisor, in violation of the Missouri Securities Act.

RELIEF REQUESTED:

A. The Bander Family requests that an arbitrator or a panel of arbitrators selected from the AAA's panel of commercial arbitrators be convened, and an expedited hearing conducted in accordance with the Commercial Arbitration Rules, including the rules relating to Expedited Proceedings and those applicable to Large Cases.

B. Upon expedited hearing of this matter in St. Louis, Missouri in accordance with the Agreement and the Commercial Arbitration Rules, the Bander Family requests that the Panel enter an award of interim relief, finding, concluding and ordering that:

1. the Advisor breached its fiduciary and statutory duties to the Bander Family as described above,

2. the Advisor's breach of its fiduciary duties was intentional, willful and malicious, and warrants an award of punitive damages,

3. The Advisor is obliged to cause the LLC's or their custodians to make immediate payments to the Bander Family of the following amounts:

a. $524,315.99, representing the heretofore undistributed 10% of the reported value at 12/31/07 of the Partnership's holdings in TowerHill Long/Short Equity, LLC (Series A);

b. $277,835.67 representing the heretofore undistributed 10% of the reported value at 12/31/07 of the Partnership's holdings in TowerHill US Equities LLC (Series A);

c. $413,415.46 representing the heretofore undistributed 10% of the reported value at 12/31/07 of the Partnership's holdings in TowerHill US Equities LLC (Series B);

d. $656,594.52 representing the heretofore undistributed 10% of the reported value at 12/31/07 of the Partnership's holdings in TowerHill International Equities, LLC;

e. Whatever interest was actually earned from January 1, 2008 through January 23, 2008 on the $6,221,260 distributed to the Partnership on January 24, 2008 in respect of the Partnership's interest in TowerHill US Equities, LLC;

f. $53,912.70, representing interest from January 2, 2008 to February 8, 2008 on the $5,909,350.60 distributed 2/08/08 in respect of the Partnership's interest in TowerHill International Equities, LLC interests. This interest is calculated at the statutory rate of 9% per annum applicable under Missouri law to obligations for the payment of money where no interest rate is specified;

g. $46,542.02, representing interest from January 2, 2008 to February 11, 2008 on the $4,718,843.91 distributed 2/11/08 in respect of the Partnership's interest in TowerHill Long/Short Equity, LLC. This interest is calculated at the statutory rate of 9% per annum applicable under Missouri law to obligations for the payment of money where no interest rate is specified;

h. interest on the as yet undistributed funds from the Partnership's interests in the TowerHill Long/Short Equity, LLC and the TowerHill International Equities, LLC, calculated as follows: $291.18 (daily rate @9% on $1,180,910.51) multiplied by days between January 2, 2008 to actual date of payment of the $1,180,910.51 withheld; and

i. whatever interest is actually earned from January 2, 2008 through the date of distribution on the $January 23, 2008 on the $691,251.13 that presently remains undistributed to the Partnership in respect of the Partnership's interest in TowerHill US Equities, LLC.

4. The Advisor shall cause such payments to be made within 3 business days of the date of the intermediate award, and, failing such payments to the Bander Family from the Investment LLC's or their respective custodians, the Advisor shall personally make such payments to the Bander Family;

5. The Advisor has failed properly to account to the Bander Family for its investments, and shall do so by furnishing to the Bander Family all of the records described in Exhibit 11 to the Demand for Arbitration and Statement of Claim and such other and further documentation as will enable the Panel to ascertain

whether the payments described above, coupled with those payments heretofore made to the Bander Family, represent all of the funds due and payable to the Bander Family by contract in connection with the investments managed by or made upon the recommendation of Advisor, within 10 days of the intermediate order;

6, A further hearing to determine the appropriate scope of additional relief to be prescribed in a final award shall be scheduled.

7. The Advisor shall pay all costs of this arbitration, including the filing and administrative fees and the arbitrators' fees.

C. Upon further hearing, the Panel determine and award such other, further and additional relief as the evidence may show to be appropriate under the circumstances, including, but not limited to, the Bander Family's reasonable attorneys fees payable pursuant to the Missouri Securities Act and such punitive or exemplary damages as are appropriate under the circumstances.

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ _____

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EXHIBIT 3

EXHIBIT PREVIOUSLY REPRODUCED IN APPENDIX AT APPENDIX E, 23a

APPENDIX H

Delaware Rules of Court
Rules of the Supreme Court
Part IV. Other Proceedings

RULE 42. INTERLOCUTORY APPEALS

(a) Exercise of Jurisdiction. The Court's jurisdiction to hear and determine appeals in civil cases from interlocutory orders of a trial court, including a trial court acting as an intermediate appellate court in the review of a ruling, decision or order of a court or an administrative agency, shall be exercised in accordance with this rule as to certification and acceptance of interlocutory appeals. All time periods under this rule should be calculated pursuant to Supreme Court Rule 11.

(b) Criteria to Be Applied in Determining Certification and Acceptance of Interlocutory Appeals. No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria:

(i) *Same as Certified Question.* Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or

(ii) *Controverted Jurisdiction.* The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(iii) *Substantial Issue.* An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or

(iv) *Prior Judgment Opened.* The interlocutory order has vacated or opened a judgment of the trial court; or

(v) *Case Dispositive Issue.* A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

(c) Procedure for Certification of Interlocutory Appeals in the Trial Court. An application for certification of an interlocutory appeal shall be made in the first instance to the trial court in accordance with the following procedures:

(i) *Application.* Such application shall be served and filed within 10 days of the entry of the order from which the appeal is sought or such longer time as the trial court, in its discretion, may order for good cause shown.

(ii) *Response.* An opposing party shall have 10 days (or such shorter time as the trial court shall in its

discretion order, upon notice for good cause shown or upon the trial court's order sua sponte) after such service within which to serve and file a written response or, if the trial court so directs, present an oral response in lieu of a written response;

(iii) *Action by Trial Court.* Within 10 days after filing of the response or, if there is none, within 20 days after filing the application, the trial court shall enter an order certifying or refusing to certify the interlocutory appeal;

(iv) *Form of Order.* Such order shall be substantially in the form set forth in Official Form L, setting forth the basis for the certification and indicating which of the criteria set forth in paragraph (b) of this rule is applicable;

(v) *Service on Trial Court.* A copy of the application and response referred to in subparagraphs (i) and (ii) of this paragraph shall, concurrently with service and filing, be delivered by the party serving and filing it to the judge of the trial court whose order is sought to be reviewed.

(d) Procedure for Acceptance of Interlocutory Appeals in the Supreme Court. No interlocutory order shall be reviewed by this Court unless the appeal therefrom has been accepted by this Court in accordance with the following procedure:

(i) *Time to File.* The notice of appeal may be filed at any time after the filing of the application for certification in the trial court, except that it shall be the obligation of appellant to serve and file in

this Court a notice of appeal of an interlocutory order within 30 days after the entry of the order from which the appeal is sought to be taken;

(ii) *Form of Filing.* The notice of appeal and any cross-appeal shall comply with this rule, Rules 6 and 7 of this Court and with such version of Official Form M as shall be applicable to the situation;

(iii) *Supplemental Notice.* If the notice of appeal is filed before action has been taken by the trial court on the application for certification, appellant shall file a supplementary notice of appeal within 10 days after the expiration of the time periods set forth in paragraph (c) of this rule.

(iv) *Contents of Notice.* The notice of appeal and the supplementary notice of appeal, if any, shall include a true and correct copy of such of the following papers as shall have been filed below except that the supplementary notice of appeal shall not contain any papers previously attached to the notice of appeal:

(A) Application. The application for certification and attachments thereto; the Court discourages unnecessary attachments to the application for certification;

(B) Order on Review. The interlocutory order from which the appeal is sought to be taken together with any opinion of the trial court with respect thereto;

(C) Response. The written response, if any, to the application for certification, or the

transcript, if and when available, of an oral response in lieu of a written response;

(D) Action by Trial Court. The order, if any, of the trial court certifying or refusing to certify the interlocutory appeal and any opinion with respect thereto; and

(E) No Action by Trial Court. If no order has been entered by the trial court on the application for certification within 30 days of the entry of the interlocutory order, a separate certificate of appellant's counsel so stating shall be attached.

(v) *Action by This Court.* Unless otherwise ordered, this Court shall thereupon and without further argument determine in its discretion whether to accept or refuse the interlocutory appeal. In exercising that discretion, this Court may consider all relevant factors, including the decision of the trial court whether to certify the interlocutory appeal.

(vi) *Proceedings After Acceptance.* From the date of the acceptance of the interlocutory appeal, further proceedings shall be governed by these Rules, except:

(A) Trial Record Not Transmitted. The record shall not, in the first instance, be transmitted to the Clerk of this Court. Instead, the respective appendices of the parties, or a joint appendix if one is agreed upon, shall contain such record materials as each party believes relevant to the determination of the issue on appeal. The Court

may, at its option, thereafter direct the clerk of the trial court to transmit all of the record, or such portions as the Court deems relevant to consideration of the interlocutory appeal.

(B) Brief Schedule. The time schedule for the filing of the briefs and appendices, pursuant to Rule 15, shall commence upon the third day following the acceptance of the interlocutory appeal, if no transcript is ordered. In the event a transcript is designated to be prepared pursuant to Rule 9(e), the brief schedule shall commence upon this Court's receipt of the court reporter's final transcript log entry.

(C) Preparation of transcript. The time schedule for the preparation and filing of the transcript, if designated pursuant to Rule 9(e), shall commence upon the third day following the acceptance of the interlocutory appeal.

(vii) *Proceedings After Refusal.* If the appeal is refused, a certified copy of the order shall be sent to the trial court and a copy thereof to each counsel.

(e) Continuation of Other Proceedings in the Trial Court. The pendency of proceedings under this rule shall not operate as an automatic stay. Applications for stays shall be processed in the same manner as stays pending appeal under Rule 32.

(f) Failure to Seek or Obtain Review of Interlocutory Order. The failure to seek review of or the refusal of the Court to accept an appeal from an interlocutory order under this rule shall not bar a

party from seeking review of such interlocutory order on appeal from the final order, judgment or decree.

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No. 08-947

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THE BANDER FAMILY PARTNERSHIP, L.P.,
Petitioner,

v.

TOWERHILL WEALTH MANAGEMENT, LLC,
TOWERHILL US EQUITIES, LLC,
TOWERHILL INTERNATIONAL EQUITIES, LLC
and TOWERHILL LONG/SHORT EQUITY, LLC,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

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IN THE

Supreme Court of the United States

No. 08-947

THE BANDER FAMILY PARTNERSHIP, L.P.,
Petitioner,

v.

TOWERHILL WEALTH MANAGEMENT, LLC,
TOWERHILL US EQUITIES, LLC,
TOWERHILL INTERNATIONAL EQUITIES, LLC
and TOWERHILL LONG/SHORT EQUITY, LLC,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF IN OPPOSITION FOR RESPONDENTS

FACTUAL BACKGROUND

In 2005, Petitioner invested money in three limited liability companies (LLCs) managed by Respondents. In connection with this investment, the parties executed three sets of contracts: an investment advisory agreement; the LLC operating agreements; and subscription agreements. Only the first two are relevant to this Petition.

The investment advisory agreement contained a Missouri choice of law provision and, in ¶ 17, a dispute resolution clause requiring binding arbitra-

tion under the Rules of the American Arbitration Association ("AAA"). App. 111a.

The LLC operating agreements (which Petitioner omitted from the appendix) contained a Delaware choice of law provision and an agreement to "submit to the jurisdiction of the Court of Chancery of the State of Delaware for resolution of any disputes." A copy of one of the LLC operating agreements, for CPW International Equities, LLC, now known as TowerHill International Equities, LLC, is included in Respondents' Supplemental Appendix. The provisions of the three LLC operating agreements relevant to this Petition are the same. Supp. App. 32a. The LLC operating agreements also provided for "non-binding arbitration or mediation." Supp. App. 32a.

At the end of 2007, Petitioner exercised its right pursuant to Article VI of the LLC operating agreements to redeem its interest in each LLC. The LLC operating agreements were the only agreements to confer redemption rights on Petitioner. The investment advisory agreement does not even mention the word.

The LLC operating agreements required each LLC to remit 90% of the value of Petitioner's interest within 30 business days after the Valuation Date. Supp. App. 16a. They required each LLC to remit the balance after an audit but "net of expenses to the Company incurred by the Company in connection with such redemption." Supp. App. 16a. Section 7.5 of each LLC operating agreement defined "expenses" to include "all other fees," including "legal fees." Supp. App. 21a.

In early 2008, Petitioner took the position that it was entitled to interest on the value of its redeemed

interests from the Valuation Date until paid, although § 3.4 of the LLC operating agreements provides that no member shall be entitled "to receive interest . . . except as expressly provided in this Agreement." Supp. App. 9a. Nothing in the LLC operating agreements provides for payment of interest on the value of redeemed interests.

Efforts to resolve the dispute were fruitless. On June 2, 2008, Petitioner filed a demand for arbitration with the AAA. App. 122a. The demand purported to rest on ¶ 17 of the investment advisory agreement. App. 127a. The substance of the demand, however, related entirely to the redemption. Thus, the demand stated that Petitioner had given written notice of its intent to "redeem its interest in each Investment LLC" effective December 31, 2007. App. 132a. The gravamen of the complaint was that Respondents had failed to pay "the remaining 10% of the reported Redemption Value," to account for "the handling and use" of the "cash held to pay the Redemption Value," and to pay interest on "the Redemption Value." App. 135a-137a ¶¶ 30; 32; 34.

In response to this demand, Respondents filed the underlying lawsuit in the forum agreed to by the parties in the LLC operating agreements, the Delaware Court of Chancery. The lawsuit sought injunctive relief to prevent Petitioner from proceeding with the arbitration and a declaratory judgment that Respondents had paid everything that the LLC operating agreements required.

At the conclusion of the hearing on Respondents' motion for preliminary injunction, the Court of Chancery made oral findings of fact. On no less than five occasions, the Vice Chancellor found that the substance of Petitioner's demand concerned the LLC

operating agreements, not the investment advisory agreement. App. 51a; 56a; 57a; 59a; 64a. As a result, the trial court granted the requested injunctive relief.

Petitioner filed an application for certification of interlocutory appeal. App. 78a. This application continued to assert that the arbitration clause in the investment advisory agreement governed the dispute. App. 95a-96a. In denying the application, the trial court again held on five separate occasions that the dispute concerned the LLC operating agreements. App. 6a; 12a; 14a; 15a; 16a.

Petitioner then filed a notice of appeal seeking permission from the Delaware Supreme Court to file an interlocutory appeal, and attached the application as an exhibit. App. 72a. The Petition asserts that "[e]ach of these filings made clear that [Petitioner] was appealing from the preliminary injunction as a matter of right pursuant to 9 U.S.C. § 16(a)(2)," the Federal Arbitration Act (FAA). Pet. at 12.

It is true that both the notice and the application referred to § 16(a)(2). App. 73a; 82a. But neither document even tried to explain why a federal procedural statute applied to a case pending in a state court. Neither document cited any authority for that proposition.

The only discussion of that issue appears in a footnote in the motion to stay filed in the Delaware Supreme Court. App. 69a. That "discussion" was limited to the assertion that "[n]o case cited by the Court of Chancery" had held that § 16(a)(2) did not apply in state court and the further assertion, unburdened by authority, that the text of the statute is not "so limited." *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS IS THE WRONG CASE TO DECIDE WHETHER CONGRESS REQUIRED STATES TO ACCEPT INTERLOCUTORY APPEALS IN ARBITRATION MATTERS.

This case is a singularly poor vehicle in which to resolve Petitioner's claim that Congress has required the states to accept interlocutory appeals from orders enjoining arbitration. First, the appeal is frivolous on the merits, so that the only consequence of this Court's review would be needless delay and expense. Second, Petitioner did not adequately present its argument to the Delaware Supreme Court and hence has waived the right to seek review.

A. Petitioner's Appeal Is Frivolous On The Merits.

The investment advisory agreement contains a mandatory arbitration clause; the LLC operating agreements do not. The trial court found, as a matter of fact, that "any reasonable reader" of the arbitration demand would conclude that the parties' dispute "is almost entirely centered on compliance with the operating agreements." App. 64a. As the record supports that factual finding, Petitioner's proposed appeal is, on the merits, completely frivolous.

The premise of that appeal is that the parties' dispute arises under the investment advisory agreement instead of the operating agreements. In its order enjoining the arbitration, the trial court repeatedly found otherwise. App. 51a (Petitioner "filed an arbitration complaint that almost entirely relies on the operating agreement"); App. 56a ("whole essence of the complaint in arbitration" is "covered

by the operating agreement's dispute resolution clause"); App. 57a (dispute is "exactly the thing" that Petitioner "consented to have adjudicated in the courts of this state"); App. 59a ("absent the specific provisions of the operating agreements . . . it wouldn't be much of a claim").

In its order denying the application to appeal, the trial court repeated those findings no less than five times. App. 6a ("its complaint in arbitration was framed explicitly and predominantly in terms of the Operating Agreements"); App. 12a (claims "arise from the Operating Agreements"); App. 14a (Petitioner's arbitration demand "repeatedly accused TowerHill of violating the Operating Agreements"); App. 15a (Petitioner's arbitration demand "arises primarily from and seeks relief for breach of the Operating Agreements"); App. 16a (Petitioner's "complaint in arbitration rests almost entirely on provisions of the Operating Agreements").

The record supports these factual findings. The entire basis for the arbitration demand relates to Respondents' alleged failure to pay "the remaining 10% of the reported Redemption Value," to account for "the handling and use" of the "cash held to pay the Redemption Value," and to pay interest on "the Redemption Value." App. 135a-136a. The relief requested was immediate disbursement of the "undistributed 10%" of Petitioner's investment in each LLC, plus interest. App. 139a-140a.

The investment advisory agreement does not say one word about redemption. The sole source of Petitioner's redemption rights is Article VI of the operating agreements. Supp. App. 15a. The sole source of Petitioner's claims is the alleged failure to

honor the redemption provisions of the operating agreements.

Because the appeal is frivolous on the merits, a grant of certiorari will only delay the ultimate disposition of the case and cause considerable expense to the parties. Suppose the Court were to grant the petition. The timing is such that the case could not be resolved this Term, so close to a year would elapse before the Court ruled.

Suppose the Court were to agree with Petitioner that it was entitled to an interlocutory appeal. This Court would not resolve the merits of the appeal but would remand to the Delaware Supreme Court which, after the lapse of many more months, would affirm on the merits. There is no reason for the Court to assist in this sort of useless delay and expense.

There are disturbing indications that delay and expense are precisely what Petitioner wants. The underlying dispute concerns approximately $150,000 in interest and the parties have spent considerably more than that on legal fees to date. This Court should not assist Petitioner in whatever ulterior motive is animating its conduct.

B. Petitioner Did Not Properly Present Its Argument To The Delaware Supreme Court And That Court Did Not Address It.

The Delaware Supreme Court did not address Petitioner's argument that § 16(a)(2) gave it a legal right to appeal, even if Delaware law did not. The reason is that Petitioner did not properly brief the issue under Delaware rules. This Court has repeatedly held that it will not address issues not ade-

quately presented to the state courts in conformity with state procedural rules.

Principles of comity dictate that this Court will not issue certiorari to a state court unless "the record **clearly shows** that the federal issue has been **properly raised**" in the state court. *Webb v. Webb*, 451 U.S. 493, 499 (1981) (emphasis added). *Accord*, *Howell v. Mississippi*, 543 U.S. 440, 444 (2005). That rule requires the petitioner to present the issue "at the time and in the manner required by the state law." *Webb*, 451 U.S. at 501.

The Delaware Supreme Court did not discuss appealability as of right under the FAA. App. 2a-3a:

> When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987), and cases there cited (internal punctuation omitted).

Here, there is no question that Petitioner did not properly present the issue to the Delaware Supreme Court. Petitioner's application for certification and its notice of appeal both cited § 16(a)(2) as a basis for the appeal. App. 73a; 82a. But neither document explained why Petitioner thought that a federal statute governed proceedings in a state court. Petitioner's only attempt to develop that argument appeared in a footnote to its motion to stay. App. 69a n.1. The footnote cited no authority for the proposition that § 16(a)(2) applied to state courts.

That "briefing" does not comply with Delaware procedural rules. Rule 14(d) of the Delaware Supreme Court Rules provides that "[f]ootnotes shall not be used for argument ordinarily included in the body of a brief." The Rule means precisely what it says: the "failure to raise a legal issue **in the text** of the opening brief generally constitutes a waiver of that claim on appeal." *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (emphasis added). *Accord*, *Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994).

This Court has squarely held that arguments to the lower tribunal limited to footnotes are inadequate to preserve a point. In *Communist Party of the U.S. v. Subversive Activities Control Board*, 367 U.S. 1 (1967), the aggrieved party attempted to raise an issue in a footnote to a 224 page brief. This Court held that such "briefing" was "plainly insufficient to raise the issue here." 367 U.S. at 34 n.10. *Accord*, *Turner Broadcasting System v. FCC*, 520 U.S. 180, 224 (1997) (argument limited to four paragraphs, two of them footnotes, provides an "insufficient basis to make an informed judgment").

For either reason, the Court should deny the petition without regard for the merits of the issue Petitioner presents.

II. PETITIONER HAS GREATLY EXAGGERATED THE ALLEGED CONFLICT BETWEEN THE VARIOUS STATE COURTS.

According to Petitioner, three state courts of last resort have "explicitly recognized" that § 16 applies in state court. Pet. at 22. This assertion greatly exaggerates the actual holdings. The cases Petitioner cites either assume that § 16 applies or look to it for

guidance in interpreting their own state laws. None of these cases hold that Congress intended to impose § 16 on states that do not wish to adopt it, which is the legal position Petitioner is advocating.

The holding in *Riscorp, Inc. v. Occupational Safety Ass'n of Alabama Workmen's Compensation Fund*, 796 So.2d 1062 (Ala. 2000), was that the petition for mandamus was untimely. 796 So.2d at 1066. The opinion contains dicta that § 16 allows an interlocutory appeal. *Id., quoting A.G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358 (Ala. 1990). In *Clark*, the parties and the court simply assumed that "defendants do indeed have a right to appeal the trial court's denial under 9 U.S.C. § 15 [sic]." 558 So.2d at 360.

In *Dyre Law Firm, PLLC v. Bradley*, 874 So.2d 984 (Miss.), *cert. denied*, 543 U.S. 1000 (2004), the opinion states that defendants appealed "pursuant to the Federal Arbitration Act." 874 So.2d at 985. The opinion did not further discuss the issue. In *Dakota Wesleyan University. v. HPG International, Inc.*, 560 N.W.2d 921 (S.D. 1997), the court "turn[ed] to the FAA for guidance" in determining appealability. 560 N.W.2d at 922.

The Petition quotes the recent decision in *Lawrence v. Beverly Manor*, 2009 WL 77879 (Mo. banc Jan. 13, 2009), for the proposition that Missouri determines appealability of arbitration orders "'under the influence, if not the command of the provisions of the Federal Arbitration Act . . . .'" Pet. at 23 n.12. The elided words are "and the Missouri Uniform Arbitration Act." 2009 WL 77879 at 1 n.2.

These cases do not create the kind of conflicts that warrant this Court's review. It is one thing for the

North Dakota Supreme Court to "turn to" the FAA for guidance, or for the Missouri Supreme Court to be "influenced" by the federal statute. It is quite another to say that Congress has required states to allow interlocutory appeals in cases when state law would otherwise disallow them.

This Court has never even hinted at endorsing the latter proposition. In the three cases in which this Court has cited § 16, it has suggested that this federal statute applies to federal cases. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 84 (2000) (§ 16 "governs appeal from a **District Court's** arbitration order"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948-49 (1995) (§ 16 "allows courts of appeals to conduct interlocutory review of certain antiarbitration **district court** rulings"); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 880 n.7 (1994) (§ 16 allows appeal "when a **district court** rejects a party's" demand for arbitration) (all emphases added).

Forcing a state to afford an interlocutory appeal as of right is highly intrusive to that state's sovereignty. Basic principles of comity and federalism dictate that, assuming that Congress has constitutional power to do so, it "must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citations and internal punctuation omitted).

Missouri requires its judges to retire at age 70. *Gregory* challenged that policy as a violation of federal Age Discrimination Act. In rejecting that challenge, this Court enunciated a number of principles that bear directly on Petitioner's theory here:

- Federal legislation "in areas traditionally regulated by the States" is "an extraordinary power" that "we must assume Congress does not exercise lightly." 501 U.S. at 460.
- This Court "must be certain of Congress' intent before finding that federal law" usurps normal state prerogatives. *Id.*
- The "requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461.
- The Court "must be absolutely certain that Congress intended" to displace state law. *Id.* at 464.

Nothing in the language of § 16 "makes it unmistakably clear" that Congress intended the statute to override contrary state law. Section 16(a) merely provides that "[a]n appeal may be taken from" various orders hostile to arbitration, including, in subsection (2), interlocutory orders enjoining an arbitration. Nothing in the text of the statute even hints that Congress intended to apply this rule to a state that would otherwise refuse such an appeal.

Nothing in the text of the statute warrants treating § 16(a)(2) differently from § 16(a)(1). If the former subsection applies to the states, so logically should the latter. But at least three subparts of subsection (a)(1) can only apply to federal courts:

- Subpart (A) permits an appeal from an order denying a stay under 9 U.S.C. § 3, which refers to proceedings in "any of the courts of the United States."

- Subpart (B) permits an appeal from an order denying a petition to enforce an arbitration clause under 9 U.S.C. § 4, which refers to a petition in any "United States district court."
- Subpart (C) permits an appeal from an order denying an application under 9 U.S.C. § 206 to compel an international arbitration. Section 206 allows such an application to a court "having jurisdiction under this chapter" and 9 U.S.C. § 203 confers such jurisdiction on "district courts of the United States."

The Petition explicitly concedes that these subparts of § 16 "can apply only to appeals from federal court orders." Pet. at 20. These subparts are clear evidence that Congress intended § 16(a) to apply to federal courts, not to state courts.

Similarly, there is no textual basis for treating 16(b) differently from § 16(a). Section 16(b) generally prohibits interlocutory appeals of orders favorable to arbitration, "[e]xcept as otherwise provided in section 1292(b) of title 28." No one has ever suggested that § 1292(b) applies to state courts and the text of that statute would not permit such an argument. So the exception makes no sense unless § 16 is confined to federal courts.

Petitioner's principal argument to the contrary is that an interlocutory appeal from an order enjoining arbitration is good policy, because it would avoid unnecessary trials. Pet. at 16-19. That argument has no relevance to the instant case because, as previously explained, Petitioner's appeal is frivolous on the merits. In any event, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text." *Mertens v. Hewitt*

Associates, 508 U.S. 248, 261 (1993). Still less are they sufficient to satisfy the "clear statement" required by *Gregory*.

Petitioner also asserts that § 16 "contains no terms that would limit its application to orders entered by federal courts," Pet. at 20, and the statute "can readily be construed to apply in state court proceedings." Pet. at 28. This argument has the law exactly backwards:

> [I]n this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included.

Gregory, 501 U.S. at 467 (emphasis original).

Finally, Petitioner claims that § 16(a)(2) is susceptible to "two inferences" that it applies to state courts. Pet. at 20. By definition, "inferences" cannot satisfy *Gregory's* requirement of a "clear statement" in the text of the statute. If § 16 did contain such a provision, Petitioner would not have to resort to inferences.

CONCLUSION

For these reasons, Respondents respectfully pray that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPERATING AGREEMENT OF CPW INTERNATIONAL EQUITIES, LLC A DELAWARE LIMITED LIABILITY COMPANY

Dated effective November 1, 2004

This OPERATING AGREEMENT, dated as of the 1st day of November, 2004, is entered into by and among the Initial Members and the Manager designated in Section 1.3. The Initial Members are listed on Exhibit A hereto. The Initial Members and such other persons hereafter admitted as members of the Company are referred to collectively as the "Members" and each, individually, a "Member." All capitalized terms used herein shall have the meaning ascribed to such terms in Exhibit B hereto.

ARTICLE I.
ORGANIZATION

Section 1.1 Formation. The Company was formed as a Delaware limited liability company under the Act, pursuant to the Certificate of Formation filed with the Secretary of State of the State of Delaware on August 6, 2004. The rights and liabilities of the Members shall be determined pursuant to the Act and this Agreement. To the extent that the rights or obligations of the Members are different by reason of any provision of this Agreement than they would be in the absence of such provision, this Agreement shall, to the extent permitted by the Act, control.

Section 1.2 Name. The name of the Company shall be "CPW INTERNATIONAL EQUITIES, LLC." All business of the Company shall be conducted under

such name. The Manager may change the name of the Company on ten (10) days' prior notice to all Members, which name change shall be effective upon the filing of an amendment to the Certificate of Formation with the Delaware Secretary of State.

Section 1.3 Manager. Except as reserved to the Members under the terms of the Act or this Operating Agreement, the Manager shall be solely responsible for the operations of the business and affairs of the Company. The Members hereby designate Capital Private Wealth Management, LLC, a Delaware limited liability company, as the Manager of the Company to act as "manager" of the Company within the meaning of the Act. The Manager may resign as manager of the Company at any time upon sixty (60) days' prior written notice to each Member. Upon giving sixty days' prior written notice, the Manager shall not be required to serve as manager until a new manager is elected.

Section 1.4 Custodian.

(a) All assets of the Company shall be held in custody by a qualified custodian independent of the Manager and of the Account Managers or by a broker-dealer registered under the Securities and Exchange Act of I934, as amended. The Manager shall appoint the Custodian in its sole discretion, which Custodian may be replaced at any time in the Manager's sole discretion. All investment transactions shall be consummated by payment to or delivery by the Custodian of the cash or other property due to or from the Company. Instructions of the Manager or any Account Manager with respect to the Company shall be made in writing. The Manager shall not take or have possession of any Company assets.

(b) The Custodian shall transfer such funds upon the direction of officers or employees of the Manager who are authorized signatories for the Company's account, only as follows:

(i) To a trust company or bank trust department or brokerage firm that, to the best of the Custodian's knowledge, is independent of the Manager or its affiliates, for the account of the Company;

(ii) To the Members named on a list provided by the Manager;

(iii) To third Persons who, to the best of the Custodian's knowledge, are independent of the Manager, (A) in payment of the fees or charges of such third Persons (including but not limited to the attorneys for the Company and Custodian), or (B) for any other purpose that, to the best of the Custodian's knowledge, is legitimately associated with the management of the Company; and

(iv) In the course of portfolio purchases and sales to a Person not affiliated with the Manager, provided that such transfer is made on a payment against delivery basis, and in the course of capital contributions and withdrawals in respect of Investment Vehicles.

Section 1.5 Place of Registered Office; Registered Agent. The address of the registered office of the Company in the State of Delaware Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, County of New Castle. The name of the registered agent at such address for service of process on the Company in the State of Delaware is Corporation Trust Center. The principal place of business of the Company shall be located at 10 South Lyle Avenue,

St. Louis, Missouri 63105. The Manager may at any time on 10 days' prior notice to all Members change the location of the Company's registered office or principal place of business or change the registered agent, if it deems it advisable.

Section 1.6 Purposes.

(a) The purposes of the Company shall be to invest, through Investment Vehicles and with Account Managers, in (i) domestic and foreign equity investments, such as stocks, financial futures, foreign exchange contracts, swaps, puts, calls, options, warrants or partnership interests, whether any of such investments are liquid or illiquid, and (ii) any other publicly traded securities which the Manager may deem advisable and in the best interest of the Company.

(b) Notwithstanding the provisions of subparagraph (a) above, the Company may not: (i) issue any senior securities; (ii) underwrite the securities of other issuers; (iii) purchase or sell real estate; (iv) invest in companies for the purpose of exercising control of management; or (v) purchase portfolio securities from or sell such securities directly to the Manager, any Account Manager, or the Custodian or any of their respective officers, directors, partners or employees, as principal for their own accounts.

Section 1.7 Term. The Company shall continue in existence until the Company is terminated pursuant to Article X.

Setiion 1.8 Fiscal Year. The fiscal year of the Company shall be the calendar year.

ARTICLE II
REPRESENTATIONS AND WARRANTIES

Section 2.1 Representations of the Members. Each Member hereby represents and warrants to each other Member and the Manager as follows:

(a) The Member is an entity duly organized, validly existing and in good standing under the laws of the state of its organization and has the requisite power and authority to make, execute, deliver and perform the Agreement, and the Agreement has been duly authorized and approved by all required action of the Member. The Agreement has been duly executed and delivered on behalf of the Member and constitutes the valid and binding obligation of the Member enforceable against it in accordance with its terms, except as enforcement thereof may be limited by applicable laws of the United States or any state thereof pertaining to bankruptcy or other laws of general application relating to creditors' rights or general principles of equity.

(b) The execution and delivery of the Agreement by the Member and the consummation of the transactions contemplated thereby (i) will not violate any statute, rule, regulation, order or decree of or require any notice to or filing with or authorization, consent or approval of any governmental body or authority by which the Member or any of the properties of the Member are bound, and (ii) will not result in a violation or breach of, or constitute a default under, any license, franchise, permit, indenture, agreement or other instrument to which the Member or any of its properties is bound.

(c) The Member is acquiring its Beneficial Interest in the Company for its own account and not with a

view to or for sale in connection with any distribution thereof.

(d) The Member:

(i) is familiar with the proposed investments of the Company;

(ii) has not been formed for the specific purpose of acquiring its interest in the Company;

(iii) is a "qualified purchaser" as defined in section 2(a)(51)(A) of the Investment Company Act of 1940, as amended;

(iv) is an "accredited investor" as that term is defined in Regulation D under the Securities Act of 1933, as amended (the "1933 Act");

(v) is not a tax-exempt entity;

(vi) has had an opportunity to discuss with representatives of the Manager the condition of and prospects for the operation and financing of the Company and such other matters as the undersigned has deemed appropriate in considering whether to become a Member of the Company; and

(vii) has been provided access to all available information about the Company requested by the Member.

(e) The purchase the Member's Beneficial Interest is being made under the direction of individuals associated with the Member having such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of such purchase.

(f) The Member understands that the Beneficial Interests in the Company have not been registered un-

der the 1933 Act, or registered or qualified under the securities laws of any state and that the Member may not transfer its Beneficial Interest.

Section 2.2 Representations of the Manager. The Manager represents and warrants as follows:

(a) The Manager is registered with the SEC as an investment adviser under the Investment Advisers Act of 1940, as amended (the "1940 Act") and acknowledges that it is a fiduciary with respect to the Company.

(b) The Manager is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. The Manager has the power and authority to make, execute, deliver and perform this Agreement and this Agreement has been duly authorized and approved by all required action of the Manager. This Agreement is a valid and binding obligation of the Manager enforceable against it in accordance with its terms, except as the enforcement thereof may be limited by applicable laws of the United States or any State thereof pertaining to bankruptcy or other laws of general application relating to creditors' rights or general principles of equity.

(c) The execution and delivery of this Agreement by the Manager and the consummation of the transactions contemplated hereby (i) will not violate any provision of the Operating Agreement of the Manager, (ii) will not violate any statute, rule, regulation, order or decree or require any notice to or filing with or authorization, consent or approval of any public body or authority by which the Manager or any of its properties are bound, and (iii) will not result in a violation or breach of, or constitute a default under,

any license, franchise, permit, indenture, agreement or other instrument to which the Manager is a party, or by which the Manager or any of its properties is bound.

ARTICLE III
CAPITAL

Section 3.1 Capital Contributions. Each Initial Member and each additional Member shall make a capital contribution to the Company in immediately available funds ("Capital Contributions") on the Valuation Date as of which it is admitted to the Company and from time to time pursuant to Section 3.3. The Manager shall maintain as part of the Company's records the name and address of each Member, the amount of each Member's total Capital Contributions and the *pro rata* portion of each Member's Capital Contributions to the total capital of the Company.

Section 3.2 New Members. The Manager shall admit a new Member or new Members, as the case may be, to the Company, (i) upon the execution and delivery of a fully executed Subscription Agreement, and (ii) upon the Manager's determination that admission of such new Member or Members is not inconsistent with the best interests of the Company. The Manager, without the consent of the Members, may amend this Agreement to reflect the admission of any new Member or Members. Each such new Member shall be admitted to the Company on the first Valuation Date following receipt by the Manager of (i) notification from the Custodian of receipt of the initial Capital Contribution of the new Member in the amount as set forth in the Subscription Agreement, (ii) an executed Subscription Agreement, and (iii) such additional documentation as the Manager shall

reasonably require to so admit such new Member to the Company. Upon admission of each Member, each Member shall be bound by the provisions of this Agreement.

Section 3.3 Additional Capital Contributions. No Member shall be required to, but may, make additional Capital Contributions on any Valuation Date. Additional Capital Contributions shall be accepted by the Manager upon a determination by the Manager that each such additional Capital Contribution is not inconsistent with the best interests of the Company, and upon notification from the Custodian of receipt of payment in full of the funds for the additional Capital Contributions.

Section 3.4 Return of Capital Interest. No Member shall be entitled to withdraw any part of its Capital Contribution, to receive interest or other earnings on its Capital Contribution or to receive any distributions from the Company, except as expressly provided in this Agreement.

ARTICLE IV
INTERESTS AND CAPITAL ACCOUNTS

Section 4.1 Beneficial Interests. A Member's "Beneficial Interest" shall mean the entire ownership interest of such Member in the Company as determined on each Valuation Date, including any and all rights, powers and benefits accorded a Member under this Agreement and the duties and obligations of such Member hereunder.

Section 4.2 Capital Accounts.

(a) A separate capital account ("Capital Account") shall be maintained in respect of each Member.

(b) Each Capital Account shall be maintained and adjusted in accordance with the applicable requirements of Section 704(b) of the Code and the Treasury Regulations relating to the allocation of tax attributes to Members. Each Member's Capital Account shall be credited with (i) the initial Capital Contribution made by such Member pursuant to Section 3.1 or 3.2, (ii) additional Capital Contributions made by such Member pursuant to Section 3.3, (iii) the amount of cash and the fair market value of other property (net of liabilities that the Company is considered to assume or take subject to) transferred by such Member to the Company as additional Capital Contributions and (iv) allocations to it pursuant to Article V of this Agreement of Company income (or items thereof) including tax-exempt income and gain. A Member's Capital Account shall be debited with (i) the cash and the fair market value of property distributed to it (net of liabilities that such Member is considered to assume or to be subject to), (ii) allocations to it of expenditures of the Company not deductible in computing its taxable income, if any, and (iii) allocations to it pursuant to Article V of this Agreement of deductions or loss (or items thereof) and pursuant to Section 7.5 of advisory fees. If any property other than cash is distributed to a Member, the Capital Accounts of the Members shall be adjusted as if the property had instead been sold by the Company for a price equal to its fair market value and the proceeds distributed.

(c) Upon the making of a Capital Contribution by a new or existing Member pursuant to Section 3.1, 3.2 or 3.3 hereof and upon a distribution in connection with the liquidation of the Company or a distribution of money or other property by the Company to a retiring or continuing Member in connection with an

increase or reduction in a Beneficial Interest in the Company, in each case on a Valuation Date, the Capital Account balance of each Member shall be adjusted in accordance with Section 4.2(b) hereof.

Section 4.3 Series of Memberships.

(a) The Manager shall have the authority, without the consent of the Members, to amend this Agreement to establish one or more series of Beneficial Interests (each, a "Series"). The Manager may, in its sole discretion, through such an amendment, designate the powers, designations, preferences and relative participating, optional and other rights, including voting rights of such Series. Such Series may also have separate rights, powers, duties and obligations with respect to specified property or obligations of the Company, and with respect to profits and losses of specified property or obligations of the Company. Finally, each such Series may have a separate business purpose or objective. If Series limitations are adopted, the Manager shall promptly amend and file an amended Certificate of Formation to provide notice of such Series limitations as set forth in the Act.

(b) Pursuant to Section 18-215 of the Act, the membership interests of the Company shall be divided into four Series, designated as Share Class A, Share Class B, Share Class C and Share Class D. The Manager shall cause the Company, on behalf of each Series (i) to maintain separate and distinct records, and (ii) to hold its assets and account for its assets for separate from the other assets of the Company or any other Series. The debts, liabilities and obligations incurred, contracted for or otherwise existing with respecting to each Series shall be enforceable against the assets of such Series only, and not

against the assets of the Company generally or any other Series.

(c) Each Member shall indicate in writing to the Company to which Series a Capital Contribution made by such Member should be contributed, and the Manager shall cause the Company to account for and maintain records with respect to such Capital Contribution in accordance with such Member's indication. The Manager shall cause the Company to account for all Capital Contributions, redemptions, withdrawals, transfers, dissolutions, liquidations and terminations, profits, and losses of each Series separately according to the provisions of Articles III, IV, V, VI, IX, X and XI. Each Series may be dissolved and its affairs wound up without causing a dissolution of the Company.

(d) In the event that there are any assets, income, earnings, profits and funds of or payments to the Company which are not readily identifiable as belonging to any particular Series, the Manager shall allocate them to, between or among any one or more Series in such manner and on such basis as the Manager, in its sole discretion, deems fair and equitable. In the event that there are any liabilities, expenses, costs, charges and reserves of the Company which are not readily identifiable as being associated with any particular Series, the Manager shall allocate and charge them to, between or among any one or more of the Series in such manner and on such basis as the Manager, in its sole discretion, deems fair and equitable. Each such allocation by the Manager shall be conclusive and binding upon the Members of all Series for all purposes.

(e) Unless otherwise provided in this Section 4.3, the Members of each Series shall have the rights,

privileges, limitations and restrictions as provided in this Agreement. Notwithstanding the voting rights set forth in this Agreement, in no event shall Members of a Series be entitled to vote with respect to any matter that does not affect any interest of their specific Series. The Manager is authorized to appoint officers, employees and agents to provide services exclusively for any of the Series.

ARTICLE V
ALLOCATIONS

Section 5.1 Allocation of Profits and Losses Among the Members. As of each Valuation Date, the Manager shall determine the net investment income, the expenses, the net realized gain or loss from sale or other disposition of assets and the net unrealized appreciation or depreciation on assets since the last Valuation Date. Except as otherwise provided in Sections 5.2, 5.3 and 5.4 hereof, the amounts so determined shall be apportioned among the Members in proportion to their Capital Accounts by such equitable method or methods of apportionment as the Manager shall deem advisable.

Section 5.3 Special Allocation. Notwithstanding any of the other provisions of this Article V to the contrary, in the event that any Member unexpectedly receives any adjustments, allocations, or distributions with respect to the Company described in Treasury Regulations 1.704-1(b)(2)(ii)(d)(4), (5), or (6), items of Company income and gain shall be specifically allocated to each such Member in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the adjusted Capital Account deficit of such Member as quickly as possible, provided that an allocation pursuant to this Section 5.2 shall be made if and only to the extent

that such Member would have an adjusted Capital Account deficit after all other allocations provided for in Section 5.1. The foregoing provision is intended to comply with Treasury Regulations 1.704-1(b)(2)(ii)(d) and shall be interpreted and applied in a manner consistent with such Treasury Regulations.

Section 5.3 Allocation of Capital Gains to Withdrawing Members. In the event a Member redeems some or all of its interest in the Company, the Manager, in its sole discretion, may make a special allocation for federal income tax purposes to such Member of the net capital gains (including allocations of items of short and long-term capital gain, and loss) recognized by the Company in such a manner as will reduce the amount, if any, by which the value of such Member's Beneficial Interest exceeds the federal income tax basis in its interest in the Company before such allocation.

Section 5.4 Special Allocation of "New Issues". If necessary and to the extent permitted under the rules of the NASD, the Company shall specially allocate only to eligible Members any long-term or short-term gains or losses, or net income or loss of any kind, attributable to direct or indirect purchases by or on behalf of the Partnership of "new issues" (as defined in such rules), including, without limitation, through the creation or designation of special Series or classes of Beneficial Interests. An eligible Member for this purpose shall be any Member who the Manager in its sole discretion determines is not prohibited by the NASD rules from acquiring such issues.

Section 5.5 Tax Incidents. It is intended that the Company will be treated as a pass- through entity for tax purposes. Subject to Section 704(c) of the Code, for Federal and state income tax purposes, all items

of Company income, gain, loss, deduction, credit and any other allocations not otherwise provided for shall be allocated among the Members in the same manner as the corresponding item of income, gain, loss or deduction was allocated pursuant to the preceding Sections of this Article V.

Secion 5.6 Tax Elections. The Manager shall make all applicable elections, determinations and other decisions under the Code, including the positions to be taken on the Company's Federal information return.

ARTICLE VI
REDEMPTION OF INTERESTS

Section 6.1 Right to Redeem Interests. Each Member shall have the right, on the terms and conditions set forth herein, to cause the Company to redeem all or part of its Beneficial interest as of the applicable Valuation Date as provided in Section 6.3 herein by delivery of a written notice (a "Redemption Notice") to the Manager of its intention to so cause a redemption; provided, however, that no Member that is redeeming only a part of its Beneficial Interest shall have the right to redeem an amount which will result in such Member's adjusted Capital Account balance, as recalculated pursuant to Section 4.2 hereof on the applicable Valuation Date for the redemption, being less than $100,000.

Section 6.2 Redemption Value. The value that the Company shall be obligated to pay to any Member electing to redeem all of its Beneficial Interest pursuant to Section 6.1 hereof shall be the amount of such Member's Capital Account balance as recalculated pursuant to Section 4.2 hereof as of the applicable Valuation Date for the redemption as provided in Section 6.3 herein (the "Redemption Value"). The value that the Company shall be obligated to pay to

any Member treated under Section 6.1 hereof as electing to redeem part of its Beneficial Interest shall be the amount subject to such Member's Redemption Notice.

Section 6.3 Mechanics of Redemption.

(a) A Member must remain in the Company for at least one year without any right of redemption. After the initial one-year period, a redemption may be made at the end of any calendar quarter, provided that a Redemption Notice has been received by the Manager thirty (30) days prior to the end of the calendar quarter, and no such direction to redeem may be revoked unless permitted in whole or in part by the Manager. Ninety percent (90%) of the Redemption Value shall be paid as soon as reasonably practicable but in any event no later than the thirtieth business day after the applicable Valuation Date. The remaining ten percent (10%) of the Redemption Value shall be paid as soon as reasonably practicable but in any event upon completion of the next Audit, and shall be made net of expenses to the Company incurred by the Company in connection with such redemption. All redemptions shall be made in cash, or, in the sole discretion of the Manager, in kind or partly in kind. The value of such property shall be determined by the Manager as of the applicable Redemption Date, and such Member shall receive such investments held by the Company as may be determined by the Manager and any Account Managers. Such distribution need not be a proportionate interest in each investment held by the Company, so long as the distribution otherwise satisfies the requirements of applicable law, including, without limitation, ERISA. The redeeming Member shall receive the Redemption Value less any fees charged in ef-

fecting such redemption. Notwithstanding the foregoing, in the event the Manager receives notification from the Custodian or one or more Account Managers to the effect that, or the Manager determines in its sole discretion that, such redemption cannot be effected or it is not reasonably practicable to effect such redemption within the time prescribed hereinabove, the Manager shall notify the redeeming Member of the same and shall cause the designated redemption to be made within such reasonable period of time as the Manager may deem appropriate. A redeeming Member shall execute such documents and certificates as the Manager shall reasonably request to evidence the partial or full redemption of such Beneficial Interest and the withdrawal of the Member in the case of a redemption of the redeeming Member's full Beneficial Interest. After any Redemption Date, the Manager shall recalculate each remaining Member's Beneficial Interest and Capital Account as of the Applicable Valuation Date.

(b) Subject to the terms of Section 6.3(a) hereof, no Member may receive a full redemption of its Beneficial Interest until the following additional conditions are met:

(c) The Redemption Notice shall have been given to the Manager on or before thirty (30) days prior to the applicable Valuation Date in accordance with Section 6.3(a) hereof; and

(d) The Manager shall determine that the Company has paid or has the ability to pay all of its liabilities, including the remaining Beneficial Interests of any remaining Members.

Section 6.4 Member Withdrawal. Subject to Section 9.1 hereof in the event of withdrawal of a Mem-

ber or the occurrence of any other event which terminates the continued membership of a Member in the Company, except as otherwise provided in this Agreement or applicable law, the successors, assigns or personal representative of the Member shall have no right to participate in the management of the business and affairs of the Company or to become a Member. Such successor, assign or personal representative shall be entitled to receive the share of profit or other compensation by way of income and return of the contribution to which the terminating Member would otherwise be entitled, as if said Member had redeemed its entire Beneficial Interest on the date of the termination of its membership in the Company.

Section 6.5 Manager's Discretion. The Manager, without the consent of the Members:

(a) May amend this Agreement to reflect the withdrawal of any Member or Members; or

(b) In its sole discretion, with or without cause, may terminate and require any Member to withdraw from the Company upon delivery to such Member of written notice of its termination, which notice shall constitute and have the same effect as a Redemption Notice given by such Member.

ARTICLE VII
OPERATIONS

Section 7.1 Exclusive Authority to Manage. Except as provided in the Act or as expressly provided herein, the ,Manager shall have the exclusive power and authority over the conduct of the Company's business, operations and affairs, including, but not limited to, the performance of investment advisory services for the Company. In furtherance thereof, the

Manager is hereby authorized and empowered, on behalf and in the name of the Company (i) to carry out the purposes of the Company and (ii) to perform all acts, and to enter into and to perform all contracts and other undertakings, including without limitation, agreements with one or more Account Managers, which the Manager may in its sole discretion deem necessary or advisable, or which are incidental, to carry out the purposes of the Company. In addition, the Manager shall be entitled to take any other action on behalf of the Company required to cause the Company to be in compliance with any applicable governmental regulations. Any action taken by the Manager shall constitute the act of and serve to bind the Company. Notwithstanding anything in this Agreement to the contrary, the Manager shall have neither the right nor the obligation to provide investment advisory services to the Company.

Section 7.2 Discretionary Authority for Investments. The Manager shall have full power and discretionary authority over the investments of the Company without prior consultation or approval of any of the Members. With the exception of overseeing and directing the liquidation by the Custodian of a holdover security, the Manager shall not be involved in the actual buying or selling transactions of any investment or security and shall not take or have possession of Company assets. Prior to the Company's investment in any Investment Vehicle, the Manager shall review such Investment Vehicle's governing documents to ensure that its investment guidelines or restrictions are appropriate and consistent with the Company's purpose. Subsequent to the Company's investment in any Investment Vehicle, the Manager shall periodically review such Investment Vehicle's investment portfolio to ensure that its

investments are appropriate and consistent with the overall objectives of the Company's strategy. To the extent the assets of the Company are subject to the Employee Retirement Income Security Act of 1974, as amended from time to time ("ERISA"), the Manager shall be authorized as a "named fiduciary" (within the meaning of Section 402(a)(2) of ERISA). The Manager shall seek investments which, in the judgment of the Manager, appear to have the capability to meet the Company's investment purposes, and shall manage the investment of Company assets in accordance with the requirements and fiduciary standards applicable to it under the 1940 Act, as amended from time to time, any regulations promulgated, and to the extent applicable, ERISA. The Manager may, in exercising its discretionary authority over the Company's investments, rely on any one or more of several criteria in selecting an Account Manager (including, but not limited to, published reports of past performance, personal interviews with the separate account manager or its employees, and historic portfolio trading or strategy information from the Account Manager). The Manager shall enter into an agreement with each Account Manager and these agreements shall be made available for review at the reasonable request of any Member.

Section 7.3 Authority to Delegate Appointment and Monitoring of Account Managers. The Manager shall have the power and authority to delegate the power and authority to select, dismiss and monitor Account Managers, without prior consultation with or approval of the Manager, to Pacific Alternative Asset Management Company, LLC ("PAAMCO") or any other sub-adviser selected by the Manager (the "Sub-Adviser"), subject to the Manager's discretion and/or supervision. Compensation for services rendered by

PAAMCO or any other Sub-Adviser utilized by the Manager for services on behalf of the Company shall be payable by the Manager.

Section 7.4 Acknowledgement. Each Member acknowledges (i) that the Manager has the authority to appoint Account Managers in accordance with this Agreement, (ii) that the Manager has the authority to appoint PAAMCO or any other Sub-Adviser it chooses to select and monitor Account Managers on its behalf and (iii) advance receipt of Part II of the Manager's Form ADV as filed with the U.S. Securities and Exchange Commission. The Manager shall provide, upon request, each Member with a current version of Part II of the Form ADV of each Account Manager appointed to act for the Company.

Section 7.5 Company Expenses. The Company shall direct the Custodian to pay the fees and expenses of the Manager as set forth in a separate fee agreement with each Member. The Manager shall instruct the Custodian to pay from the assets of the Company all other fees and expenses of the Company, including, but not limited to Custodian, Account Manager, accounting, tax, audit or legal fees.

Section 7.7 Members. Except as provided in the Act or as otherwise expressly provided in this Agreement, the Members shall take no part in the conduct, management, operation or control of the Company or the Company's business and shall have no authority or power to act for or to bind the Company. No Member shall take any action on behalf of the Company or in any way commit the Company to any agreement or obligation and the Members shall have no right, power or authority to do any of the foregoing.

Section 7.7 Valuations. Notwithstanding anything herein to the contrary, the Manager in making valuation determinations with respect to the assets of the Company required by or necessary for the purposes of this Agreement may rely, whenever practicable and in its sole discretion, on valuations provided by the Account Managers, PAAMCO, any other Sub-Adviser, Custodian or independent auditors selected by the Manager or the Account Managers.

Section 7.8 Removal of Manager. The Manager may be removed by a vote of a majority of the Beneficial Interests only if the Manager has engaged in conduct constituting (i) gross negligence, willful or criminal misconduct which causes a material loss to the Company or a Member; (ii) willful breach of this Agreement, the Account Manager Agreement, the Sub- Adviser Agreement or the Custodian Agreement which causes a material loss to the Company or a Member or (iii) a breach of its fiduciary duties to the Company or a Member which causes a material loss to the Company or a Member. Such removal shall be effective upon the appointment of a new manager and the assumption of the duties of the Manager by such new manager, provided that the Manager has no duty to act during the period between the removal of the Manager and the appointment of the new manager.

ARTICLE VIII
ACCOUNTING

Section 8.1 Books and Records. The Manager shall cause to be maintained books of account of the Company, which shall be maintained in accordance with generally accepted accounting principles in the United States of America consistently applied, and all other records necessary, convenient, or incidental

to the business of the Company as provided for herein.

Section 8.2 Reports.

(a) After the end of each fiscal year of the Company, the Manager shall cause to be prepared and distributed to each Member and to the Company, at the expense of the Company, an audited balance sheet showing the assets and liabilities of the Company as of the close of such year and an audited statement of income and expenses showing the results of operations for such year (collectively, the "Financial Statements"), which audits (each, an "Audit") shall be performed by a firm of independent public accountants selected by the Manager. The requirement for such Audits of the Company outlined in this Section may be waived at any time, for any reason, by Members holding a majority interest of the Capital Accounts of the Company. The Manager shall cause to be prepared and distributed to a Member unaudited Financial Statements quarterly, and as of a Valuation Date upon the reasonable request of the Member. As soon as possible after the end of each fiscal year of the Company, the Manager shall deliver to each Member such information as shall be necessary for the preparation by such Member of its Federal and state income or other tax and information returns.

(b) The Manager shall cause the following documents to be prepared and distributed to each Member quarterly: (i) a statement of the value of the Member's Beneficial Interest in the Company; (ii) a cash statement of the transaction activity regarding the Member's Beneficial Interest since the end of the previous quarter; (iii) a portfolio level valuation report, if requested; and (iv) a portfolio level cash

statement of the transaction activity, if requested. In addition, customized reports may be made available upon the request and at the expense, payable in advance, of the requesting Member.

(c) If the assets of the Company are deemed to be the assets of any Member or Member subject to ERISA, the Manager shall, on or before the date prescribed by laws (i) transmit to each Member subject to ERISA all information necessary to enable such Member to comply with the requirements of Title I of ERISA, together with an appropriate certification of the accuracy of such information as required by Section 103(a)(2) of ERISA and (ii) file directly with the U.S. Department of Labor ("DOL") the information called for by DOL regulations codified at 29 C.F.R. § 2520.103-12, if such filing procedure is available to the Company.

(d) The Manager shall cause information regarding any material changes in the Act to be provided to the Members as promptly as practicable, and shall provide the Members with reports on any other changes in such from time to time as the Manager shall in its sole discretion deem necessary or advisable.

Section 8.3 Approval of Reports. A Member to which a report or statement is submitted pursuant to Section 8.2 hereof may approve such report by an instrument in writing delivered to the Manager. If such Member does not file exceptions or objections to such report with the Manager within ninety (90) days after such report is received, such Member shall be deemed to have approved such report. Upon the approval of such report, either in writing or by failure to file timely exceptions or objections with the Manager, the Manager shall, to the extent permitted by applicable law, be released, relieved and discharged of and

from all liability to all such Members and to all Persons to whom the Manager is required to report with respect to its acts or failures to act described by such report during the period covered thereby.

Section 8.4 Inspection of Company Records. Each Member shall have the right, subject to reasonable standards established by the Manager in its sole discretion, to audit, examine and make copies of, or extracts from, the books of account and other financial records of the Company as listed in Section 18-305(a) of the Act, at its principal place of business upon reasonable demand for any purpose reasonably related to the Member's interest as a Member of the Company. Each Member shall bear all expenses incurred in any examination made for such Member's account and shall keep all information obtained during such inspection confidential. In the exercise of their rights under this Section, the Members agree that they shall not cause any unreasonable interference with or disruption of the Company business. If required by applicable law, the Manager agrees to provide the CFTC, the National Futures Association, the United States Department of Justice and such other governing regulatory agency with jurisdiction over the business of the Company and their representatives with access to the records of the Company in the possession and control of the Manager.

ARTICLE IX
TRANSFERS

Section 9.1 Transfers. No Member may sell, assign, transfer, exchange, charge, pledge, give, hypothecate or otherwise convey or encumber (any such transaction being hereinafter referred to as a "Transfer"), directly or indirectly, by operation of law or otherwise, voluntarily or involuntarily, any Beneficial

Interest without the prior written consent of the Manager; provided, however, that a transfer of title by a trustee or other fiduciary of a Member to a successor fiduciary or agent shall not be deemed a Transfer for purposes of this Section. Any Transfer of any Beneficial Interest in contravention of this Article IX shall be null and void and of no force whatsoever.

ARTICLE X
DISSOLUTION, LIQUIDATION AND TERMINATION OF COMPANY

Section 10.1 Limitations. The Company may be dissolved, liquidated and terminated only pursuant to the provisions of this Article X and the parties hereto hereby irrevocably waive any and all other rights they may have to cause a dissolution of the Company or a sale or partition of any or all of the Company's assets.

Section 10.2 Exclusive Causes. Only the following events shall cause the Company to be dissolved, liquidated and terminated:

(a) The unanimous written agreement of the Members to so dissolve, liquidate and terminate the Company;

(b) The sole discretion of the Manager; or

(c) A dissolution of the Company required under the provisions of Section 18-801 or 18-802 of the Act.

Section 10.3 Liquidation. Subject to the requirements of Sections 18-803 and 18-804 of the Act, in all cases of dissolution of the Company the business of the Company shall be continued to the extent necessary to allow an orderly winding up of its affairs, including the liquidation of the assets of the Company

pursuant to the provisions of this Section, as promptly as practicable thereafter, and each of the following shall be accomplished:

(a) The Manager shall cause to be prepared a statement setting forth the assets and liabilities of the Company as of the date of dissolution, a copy of which statement shall be furnished to all of the Members.

(b) The property of the Company shall be liquidated or distributed in kind by the Manager as promptly as possible, but in an orderly, businesslike and commercially reasonable manner. The Manager may, in the exercise of its business judgment and if commercially reasonable, determine (i) to sell all or any portion of the property of the Company to a Member, provided that the purchase price is not less than the fair market value of such property as determined in the sole discretion of the Manager or its designee, or to any other Person; provided further, such sale does not violate applicable law, including, without limitation, the prohibited transaction provisions of ERISA or the Code, or (ii) not to sell all or any portion of the property of the Company, in which event such property and assets shall be distributed in kind pursuant to Section 10.3(d).

(c) Any gain or loss realized by the Company upon the sale of its property shall be deemed recognized and allocated to the Members in the manner set forth in Article V. To the extent that an asset is to be distributed in kind, such asset shall be deemed to have been sold at its fair market value on the date of distribution, the gain or loss deemed recognized upon such deemed sale shall be allocated in accordance with Article V and the amount of the distribution

shall be considered to be such fair market value of the asset.

(d) The proceeds of sale and all other assets of the Company shall be applied and distributed as follows and in the following order of priority:

(i) To the payment of the debts and liabilities of the Company (including, without limitation, any incentive fees and any other amounts owed to the Manager, any Account Manager and the Custodian) and the expenses of liquidation or distribution;

(ii) To the setting up of any reserves which the Manager shall determine to be reasonably necessary for contingent, unliquidated or unforeseen liabilities or obligations of the Company or the Member arising out of or in connection with the Company. Such reserves may, in the discretion of the Manager, be held by the Manager or such bank or title company as escrow holder or liquidating trustee for the purposes of disbursing such reserves to satisfy the liabilities and obligations described above. Such reserves shall be held for such period as the Manager shall deem advisable, and upon the expiration of such period, any remaining balance shall be distributed as provided in clause (iii) of this subsection; and

(iii) The balance, if any, to the Members having positive Capital Account balances (after all adjustments thereto otherwise required hereunder), proportionately to their respective positive Capital Account balances (as so adjusted); provided, that in the discretion of the Manager, sale proceeds and assets to be distributed in kind need not be distributed pro rata so long as the

aggregate distributions are in the amounts set forth in this Section 10.3(d)(iii) and the distribution otherwise satisfies the requirements of applicable law, including without limitation, ERISA.

ARTICLE XI
INDEMNIFICATION AND LIABILITY

Section 11.1 Limitation of Liability. To the maximum extent permitted by applicable law, the Manager shall not be liable to the Company or the Members (i) for mistakes of judgment or for any act or omission suffered or taken by it, or for losses due to any such mistakes, action or inaction, except to the extent of the willful misfeasance, bad faith or gross negligence of such Manager or (ii) for the willful misfeasance, gross negligence, bad faith or other conduct of any independent contractor of the Company selected by the Manager, provided that such independent contractor (including any who may be a Member) was selected, engaged or retained and continued in good faith and in a manner reasonably believed to be in the best interests of the Company; provided, however, that the Manager shall not be liable for any act or omission suffered or taken by any Account Manager or the Custodian.

Section 11.2 Indemnification. Except as set forth in Section 11.1, to the maximum extent permitted by applicable law, the Manager shall not be liable for and the Company shall indemnify the Manager against, and agrees to hold the Manager harmless from, all liabilities and claims (including reasonable attorney's fees and expenses in defending against such liabilities and claims) against the Manager, arising from the Manager's performance of its duties in conformance with the terms of this Agreement.

Section 11.3 Consultation with Legal Counsel and Accountants. The Manager may consult with legal counsel or accountants selected by the Manager and, to the maximum extent permitted by applicable law, any action or omission suffered or taken in good faith in reliance and accordance with the written opinion or advice of any such counsel or accountants (provided such counsel has been selected with reasonable care) shall be full protection and justification with respect to the action or omission so suffered or taken.

Section 11.4 Member's Capital Contribution. Except as set forth in Section 11.1, the Manager shall not be personally liable for the return of all or any part of a Member's Capital Contribution or payment of any amounts allocated to it or credited to its Capital Account, which return or payment shall be made solely from, and to the extent of, the Company's assets.

ARTICLE XII
MISCELLANEOUS

Section 12.1 Additional Procedures. The Manager may establish any additional procedures necessary to implement the provisions of this Agreement.

Section 12.2 Notices. Any and all notices, demands, consents, approvals, requests or other communications which any Member may desire or be required to give hereunder (collectively, "Notices") shall be by telex or telecopy, confirmed by airmail to the Members at their addresses referred to on Exhibit A or such other address as a Member may from time to time designate to the others. Telex or telecopy notice shall be deemed to have been received twenty-four (24) hours after dispatch, but nevertheless it shall be confirmed by airmail within twenty-four (24) hours of dispatch. Any Member may designate another ad-

dress (and/or change its address) for Notices hereunder by a Notice given pursuant to this Section.

Section 12.3 Confidentiality. The Manager and the Members of the Company agree that all information and advice provided by or to the Manager, a Member, or the Custodian hereunder shall be treated as confidential and shall not be disclosed to third parties (other than necessary service providers for the Company) except as required by law.

Section 12.4 Entire Agreement. This Agreement constitutes the only agreement between the parties hereto pertaining to the subject matter hereof, and supersedes any and all prior agreements or understandings between the parties hereto pertaining to the subject matter hereof.

Section 12.5 Section Headings. The section headings used in this Agreement are intended solely for convenience of reference and shall not in any manner amplify, modify or otherwise be used in the interpretation of any of the provisions hereof.

Section 12.6 Counterparts. This Agreement may be executed in several counterparts and all such executed counterparts shall constitute a single agreement, binding on all of the parties hereto, their successors and their assigns, notwithstanding that all of the parties hereto are not signatories to the original or to the same counterpart. Each counterpart signature page so executed may be attached to a master counterpart of this Agreement to be kept by the Manager at the principal office of the Company and such master counterpart as well as any and all other counterparts executed by any of the parties hereto shall constitute a single agreement.

Section 12.7 Severability. In case any one or more of the provisions contained in this Agreement shall be invalid or unenforceable in any jurisdiction, the validity and enforceability of all remaining provisions contained herein shall not in any way be affected or impaired thereby; and the invalid or unenforceable provisions shall be interpreted and applied so as to produce as near as may be the economic result intended by the Members.

Section 12.8 Governing Law. This Agreement, including its existence, validity, construction and operating effect, and the rights of each of the parties hereto, shall be governed by and construed in accordance with the laws of the State of Delaware (without regard to principles of conflicts of laws) to the extent not preempted by applicable Federal law. The Manager and the Members agree to submit to the jurisdiction of the Court of Chancery of the State of Delaware for resolution of any disputes arising under or in connection with this Agreement and that service of process may be effected upon each of them by serving the registered agent for the Company in the State of Delaware as set forth for the Company on the records of the Secretary of State of the State of Delaware.

Section 12.9 Non-Binding Arbitration/Mediation. The foregoing Section 12.8 notwithstanding, the Members and the Manager agree that any disputes relating to, arising under or in connection with this Agreement or the Company generally shall first be submitted to non-binding arbitration or mediation in the State of Missouri, County of St. Louis prior to being submitted to the Delaware Court of Chancery.

Section 12.10 Consents. Any consent or approval to any act or matter required under this Agreement shall be in writing and shall apply only with respect

to the particular act or matter to which such consent or approval is given, and shall not relieve any Member from the obligation to obtain the consent or approval, as applicable; wherever required under this Agreement to any other act or matter.

Section 12.11 Limitation on Liability. The Members shall not be bound by, or be personally liable for, the expenses, liabilities or obligations of the Company, and the liability of each Member shall be limited solely to the amount of its Capital Contribution as provided under Article III.

Section 12.12 Power of Attorney.

(a) Each Member, by its execution hereof, hereby irrevocably makes, constitutes and appoints the Manager as its true and lawful agent and attorney-in-fact, with full power of substitution and full power and authority in its name, place and stead to make, execute, sign, acknowledge, swear to, record and register (i) any amendment to this Agreement which has been adopted by the Members and the Manager as provided in Section 12.13 hereof; (ii) all certificates and other instruments deemed advisable by the Manager to carry out the provisions of this Agreement and applicable law to permit the Company to become or to continue as a limited liability company in each jurisdiction where the Company may be doing business; (iii) all instruments that the Manager deems appropriate to reflect a change or modification of this Agreement in accordance with this Agreement; (iv) all conveyances and other instruments or papers deemed advisable by the Manager, including, without limitation, those to effect the dissolution and termination of the Company; (v) all fictitious or assumed name certificates required or permitted to be filed on behalf of the Company; (vi) all other instruments or

papers which may be required or permitted by law to be filed on behalf of the Company; (vii) any documents which would be required to allow the admission of new members or the withdrawal of existing members; and (viii) the continuation of the Company with the change of Membership.

(b) The foregoing power of attorney:

(i) is coupled with an interest, shall be irrevocable and shall survive the bankruptcy of each Member; and

(ii) may be exercised by the Manager either by signing separately as an attorney-in-fact for each Member or, after listing all of the Members executing an instrument, by a single signature of the Manager acting as attorney-in-fact for all of them.

Section 12.13 Amendment Waiver or Modification. Except as otherwise provided in this Agreement, no amendment, waiver or modification to this Agreement shall be effective without the prior written consent of the Members holding a majority in interest of the Capital Accounts of all Members (or theft designees, if any, appointed pursuant to a valid power of attorney); provided, however, that no amendment, waiver or modification to this Agreement shall be effective with regard to the obligations or compensation of the Manager hereunder with the prior written consent of the Manager. In addition to the rights granted elsewhere in this Agreement to the Manager to amend this Agreement without the consent to the Members, the Manager shall have the right to amend this Agreement without the consent of the Members (i) to reflect a change in the membership of the Company and (ii) to effect any change in the terms of this

Agreement which, in the reasonable judgment of the Manager, does not adversely affect the rights of the Members or which does not increase the obligations of the Members, except as may be otherwise provided under the Act.

IN WITNESS WHEREOF, the Members and the Manager have signed this Agreement as of the day and year first above written.

Manager:	CAPITAL PRIVATE WEALTH MANAGEMENT, LLC, a Delaware limited liability company By: _____ Name: _____ Its: _____
Individual Members:	By: _____ Name: _____
Entity Members:	Entity: _____ By: _____ Name: _____ Its: _____
Members Who Appointed Manager as Attorney-in-Fact	CAPITAL PRIVATE WEALTH MANAGEMENT, LLC, a Delaware limited liability company By: _____ Name: _____ Its: _____

APPENDIX B

DEFINITIONS OF TERMS

"Account Manager" shall mean the Account Managers appointed pursuant to Section 7.1 from time to time.

"Act" shall mean the Delaware Limited Liability Company Act as amended from time to time.

"Agreement" shall mean this Operating Agreement as amended from time to time.

"Audit" shall have the meaning ascribed to it in Section 8.2(a).

"Certificate of Formation" shall mean the Certificate of Formation of CPW International Equities, LLC, as amended from time to time.

"Beneficial Interest" shall have the meaning ascribed to it in Section 4.1.

"Capital Account" shall have the meaning ascribed to it in Section 4.2(a).

"Capital Contribution" shall have the meaning ascribed to it in Section 3.1.

"Code" shall mean Internal Revenue Code of 1986, as amended from time to time, including the corresponding provisions of any successor law.

"Company" shall mean the CPW International Equities, LLC.

"Custodian" shall mean the custodian of the Company appointed by the Manager in its sole discretion, or any successor thereto appointed by the Manager pursuant to Section 1.4 of this Agreement.

"Custodian Agreement" shall mean the Custodian Agreement entered into by and between the Custodian and the Company.

"ERISA" shall mean the Employee Retirement Income Security Act of 1974, as amended from time to time.

"Financial Statements" shall have the meaning ascribed to it in Section 8.2(a).

"Investment Vehicles" shall mean any investment fund in which the Company invests.

"Manager" shall have the meaning ascribed to it in Section 1.3.

"Member(s)" shall have the meaning ascribed to it in the first paragraph of this Agreement.

"NASD" shall mean the National Association of Securities Dealers, Inc.

"Notices" shall have the meaning ascribed to it in Section 12.2.

"Person" shall mean and include an individual, a partnership, a joint venture, a corporation, a trust, a limited liability company, an unincorporated organization and a government or other department or agency thereof or any other entity.

"Redemption Date" shall mean the date on which any funds are paid by the Company to a redeeming Member pursuant to a duly delivered Redemption Notice.

"Redemption Notice" shall have the meaning ascribed to it in Section 6.1.

"Redemption Value" shall have the meaning ascribed to it in Section 6.4.

"Sub-Adviser Agreement" shall mean the Sub-Adviser Agreement entered into by and between the Manager and the Sub-Adviser.

"Transfer" shall have the meaning ascribed to it in Section 9.1.

"Treasury Regulation" shall mean the applicable provisions of the income tax regulations promulgated under the Code, as amended from time to time, including the corresponding provisions of any succeeding regulations.

"Valuation Date" or "Valuation Dates" shall mean the last business day of each calendar month and any other day which the Manager may, in its sole discretion, fix from time to time.

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(3)

No. 08-947

FILED
MAR 9 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

THE BANDER FAMILY PARTNERSHIP, L.P.,
Petitioner,

v.

TOWERHILL WEALTH MANAGEMENT, LLC,
TOWERHILL US EQUITIES, LLC,
TOWERHILL INTERNATIONAL EQUITIES, LLC,
and TOWERHILL LONG/SHORT EQUITY, LLC,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondents do not dispute that this case presents an important issue of federal law that this Court has not previously addressed:

> Does Section 16(a)(2) of the Federal Arbitration Act (the "FAA"), 9 U.S.C. §16(a)(2), confer on a party preliminarily enjoined by a state court from arbitrating a dispute involving commerce a right of appeal from that injunction?

Instead, they argue the Court should decline to use this case as the vehicle to resolve this unsettled aspect of federal arbitration law because of (a) supposed weaknesses in Petitioner's case on the merits, (b) a purported waiver of the question presented, and (c) the split of authority Petitioner described is illusory.

Respondents' arguments are factually unfounded and logically fallacious. They should be rejected, and the Writ should issue.

ARGUMENT

1. Petitioner's Arbitration Demand and Notice of Appeal Submitted Meritorious Claims To Arbitration And Presented A Meritorious Appeal From The Preliminary Injunction Against Arbitration.

The Brief in Opposition for Respondents ("Resp. Br.") argues that Petitioner, The Bander Family Partnership, L.P. ("Bander") is engaged in frivolous litigation with Respondents, and that the Petition for Writ of Certiorari ("Ptn.") should be denied for that reason. Respondents are wrong.

Bander is not engaged in frivolous litigation. Bander and its investment advisor, Respondent TowerHill Wealth Management, LLC (the "Advisor") agreed in an investment advisory agreement (the "IAA") to resolve their disputes through binding arbitration. Ptn. 111a, ¶17. Bander commenced an arbitration in accordance with the IAA. The Advisor and three limited liability companies managed and controlled by the Advisor, Respondents TowerHill US Equities, LLC, TowerHill Long/Short Equity, LLC, and TowerHill International Equities, LLC (collectively, the "Investment LLCs") then sued Bander to enjoin the arbitration (and avoid the Advisor's contractual agreement to arbitrate its disputes with Bander). Bander's defense of the litigation has been consistently aimed at bringing it to conclusion so that the (now enjoined) arbitration can be resumed.

Contrary to Respondent's description (Resp. Br. 2-3, 7), the disputes between Bander and the Advisor do not involve a claim for $150,000 in interest on

Bander's capital accounts with the Investment LLCs. The disputes arise from the Advisor's persistent refusals to:

(1) provide Bander with accounting information TowerHill was contractually obliged to furnish Bander;[1]

(2) deliver to Bander $1.8 million the Advisor reported was due Bander upon Bander's December 31, 2007 redemption of investments controlled by the Advisor;[2] and

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[1] The Advisor's obligations to provide the accounting information are specified in the IAA (Ptn. 107a, ¶6) and the Investment LLCs' operating agreements. Resp. Br. 22a – 25a. The Advisor's refusals to provide the information are described in Bander's Demand for Arbitration and Statement of Claim (the "Demand"). Ptn. 127a, ¶3.a, 133a – 135a, ¶¶21 – 27. The Demand expressly requests an accounting. Ptn. 140a – 141a, ¶¶5 – 6.

[2] Bander's redemption of its membership interests in the Investment LLCs was effective December 31, 2007. Ptn. 132a, ¶16. The Advisor (belatedly) reported to Bander that the Redemption Value of Bander's investments the Advisor managed pursuant to the IAA and through the Investment LLCs was approximately $18.8 million. Ptn. 134a – 137a, ¶¶23 – 24, 28, 31, 33. The Advisor was obliged to pay Bander the Redemption Value of Bander's interests "as soon as reasonably practicable" – not simply by the "drop dead" dates described in Respondents' Brief. *Compare* Resp. Br. 2 (referencing payment dates keyed to 30 days after the Valuation Date and "after an audit") *with* Resp. Br. 16a. Bander's Demand explicitly alleged this obligation and its breach through late payments of 90% of the Redemption Values and improper withholding of the remaining $1.8 million. Ptn. 130a – 131a, ¶¶10 – 13; 132a – 133a, ¶¶17 – 19, 135a – 137a, ¶¶28 – 34, 138a – 140a, ¶¶3.a – 3.d.

Post-Demand, the Advisor paid Bander approximately $0.8

(3) pay Bander interest on the funds due Bander from and after the points in time when the payments became past due.[3]

The disputes between Bander and the Advisor do involve the Advisors' duties as Manager of the Investment LLCs. That does not mean they are not disputes the Advisor and Bander agreed "shall" be resolved through binding arbitration pursuant to the American Arbitration Association's (the "AAA") Commercial Arbitration Rules: disputes "arising out of or relating to" the IAA. Ptn. 111a, ¶17.

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million of the $1.8 million reportedly due Bander, and Bander learned that the Advisor did not have sufficient cash under its control to pay the entire $18.8 million due Bander until January 7, 2008. Thus, when the arbitration resumes, Bander expects to seek (1) an accounting, (2) payment of $1 million in principal (and whatever other sums are due as shown by the accounting), and (3) interest on portions of the principal only from January 7, 2008, rather than January 2, 2007 as described in the Demand.

[3] Under Delaware law, when a member of an entity like the Investment LLCs withdraws, it ceases to have a capital stake in the entity, and becomes a creditor. *Schuss v. Penfield Pr's, L.P.*, 2008 WL 2433842 (Del. Ch. June 13, 2008). Consequently, section 3.4 of the Investment LLCs' operating agreements cited by Respondents as controlling Bander's right to interest on money distributable following Bander's withdrawal from membership in the Investment LLC (Resp. Br. 2 – 3) is inapposite to Bander's claim. Bander is seeking interest on past due payments. This Court has long recognized the right of payees to such interest. *Spalding v. Mason*, 161 U.S. 375, 396 (1896).

Bander's investments in membership interests in the Investment LLCs were made pursuant to the IAA.[4] The Advisor created the Investment LLCs as vehicles through which the Advisor would manage its clients' (including Bander's) investments. The Advisor was discharging its obligations under the IAA by serving as the Investment LLCs' Manager.[5] Indeed, the Advisor's sole permitted compensation for its services as Manager of the Investment LLCs was the investment advisory fees the Advisor earned and was paid pursuant to the IAA (and similar advisory agreements between the Advisor and its other clients). Resp. Br.

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[4] The IAA lists the eligible managers and the eligible investment vehicles through which the various eligible managers are to be retained. Ptn. 113a – 114a. Each of the Investment LLCs appears on that list (under its former name) as an eligible investment vehicle. *Id.; see discussion at* Ptn. 8, n.5.

[5] Paragraph 1 of the IAA (Ptn. 103a), obliged the Advisor to "select one or more investment managers . . . to provide investment advice with respect to" Bander's assets placed under Advisor's management. With respect to the $12.6 million of Bander's money invested through the Investment LLCs, the Advisor discharged this IAA – created obligation by (a) selecting the Investment LLCs as investment vehicles for Bander's money, and then (b) as the Manager of the Investment LLCs, engaging the services of investment managers to the Investment LLCs. Bander's money did not pass from the Advisor's control when the Advisor caused Bander to purchase membership interests in the Investment LLCs. As the Manager of each Investment LLC (Ptn. 29a; 129a), the Advisor was "solely responsible for the operations of the business and affairs of" each Investment LLC. Resp. Br. 2a, §1.3; *see also*, Resp. Br. 18a – 21a, Art. VII. Consequently, the Advisor's actions as Manager of the Investment LLCs, while authorized by the Investment LLCs' operating agreements, were undertaken by the Advisor to discharge its IAA-prescribed obligations to Bander.

21a, ¶7.5. Consequently, even where the propriety of the Advisor's actions is measured by a standard prescribed by an Investment LLCs' operating agreement, disputes over the Advisor's adherence to that standard fall comfortably within the broad scope of the IAA's arbitration clause. *Dunn Indus. Group, Inc. v. City of Sugar Creek,* 112 S.W.3d 421, 428 (Mo. 2003); *Kansas City Urology, P.A. v. United Healthcare Services,* 2008 WL 2726919, *3 (Mo. App. W.D. July 15, 2008); *URS Co.-Kansas City v. Titus County Hosp. Dist,* 604 F. Supp. 423 (W.D. Mo. 1985).[6]

Respondents assert that Bander's claims "arise under" the Investment LLCs' operating agreements. From that premise, they argue those claims are not arbitrable pursuant to the IAA and the arbitration was properly enjoined. Resp. Br. 5 - 7. Arbitrability pursuant to the IAA does not depend upon whether a dispute "arises under" the Investment LLCs' operating agreement. Those agreements are not mentioned in the IAA's arbitration clause. Under the IAA's arbitration clause Bander and the Advisor "shall" resolve through binding AAA arbitration disputes "arising out of or relating to" the IAA. Ptn. 111a, ¶17. The disputes described in Bander's Demand are such disputes.

The Delaware Supreme Court need not – and actually should not – decide whether Bander's dispute with the Advisor is arbitrable pursuant to the IAA in arriving at a decision to vacate the injunction against the arbitration. The injunction should be vacated

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[6] The IAA has a Missouri choice of law provision. The law of other states and the federal courts is in accord.

because (1) the Court of Chancery has no jurisdiction over Bander[7], (2) the Court of Chancery is only authorized to enjoin arbitrations where (a) a valid arbitration agreement was not made, or (b) the claim sought to be arbitrated is barred by the limitation in 10 Del. C. §5702(c)[8] (and neither of these criteria is satisfied in this case); and (3) by agreeing to arbitrate under AAA Rules, Bander and the Advisor clearly and unmistakably evinced their agreement that arbitrators, not the courts, should determine arbitrability.[9] Ptn. 78a – 102a.

2. The Existence Of Appeal Rights Should Be Decided Without Regard To The Anticipated Merits Of The Appeal.

The question presented to this Court concerns the existence of a right to appeal from an interlocutory order enjoining an arbitration proceeding. The existence or absence of a right of appeal must always be determined independently of the underlying merits of the appeal. *Shales v. General Chauffeurs, Sales*

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[7] The Court of Chancery relied on conditional consents to jurisdiction even though it is undisputed that the condition precedent to those consents had not occurred. Ptn. 55a – 56a; 79a.

[8] *Bailey v. Bender*, 1992 WL 113452 (Del. Ch. May 26, 1992); *Fritz v. Nationwide Mut. Ins. Co.*, 1990 WL 186448, at *2 (Del. Ch. Nov. 26, 1990) (stating that the grounds specified in 10 Del. C. §5703(b) are the only grounds upon which an arbitration proceeding may be enjoined by the Court of Chancery).

[9] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006); *see also, Terminix Intern. Co. L.P. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 120 – 122 (2d Cir. 2003).

Drivers and Helpers Local Union No. 330, __ F.3d __, 2009 WL 483193, *2 (7th Cir., Feb. 27, 2009). Consequently, neither the strength of Bander's claims against the Advisor nor any supposed weaknesses of Bander's appeal from the preliminary injunction against arbitration should factor into this Court's decisions to grant the Petition and order the Delaware Supreme Court to hear Bander's appeal.

3. Bander Took Every Step Available Under The Delaware Supreme Court's Rules To Alert the Delaware Supreme Court To Bander's Claimed Federal Right Of Appeal From The Injunction Against Arbitration.

Respondents maintain that this Court should reject Bander's Petition because "Bander did not properly brief the issue [presented in this case] under Delaware Rules". Resp. Br. 7. Respondents do not cite even a single Delaware Rule that permitted, much less required, Bander to do more than it did to invoke its right of appeal pursuant to 9 U.S.C. §16(a)(2). Respondents' Brief is devoid of citation to any such Rule for the simple reason that none exists.

The Delaware Supreme Court has by Rule prescribed very specific ways in which appeals to that court must be commenced. Rule 7, Del. S. Ct. Rules;[10] Rule 42, Del. S. Ct. Rules.[11] These prescriptions include requirements that "The notice of appeal . . .

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[10] The text of Rule 7 of the Delaware Supreme Court's Rules is reproduced in the appendix to this Brief at pp. 1a - 5a.

[11] The text of Rule 42 of the Delaware Supreme Court's Rules appears in the appendix to the Petition. Ptn. 144a - 150a.

shall: . . . . (7) Comply substantially with Official Forms A and B of these Rules" (Rule 7(c)(7), Del. S. Ct. Rules) and "The notice of appeal . . . shall comply with this rule, Rules 6 and 7 of this Court and with such version of Official Form M as shall be applicable to the situation". Rule 42(d)(ii), Del. S. Ct. Rules.

The "Forms" referenced in the above quoted Rules allow no briefing.[12] The most Bander could reasonably do to invoke its rights under Section 16(a)(2) before the Delaware Supreme Court accepted its appeal was that which Bander did: to ask the court, at the outset of the notice of appeal, to:

> PLEASE TAKE NOTICE that pursuant to 9 U.S.C. §16(a)(2) . . . the Bander Family Partnership, L.P. (the "Partnership") does hereby appeal . . . from the order of the Court of Chancery . . . enjoining an arbitration . . . .

Ptn. 73a.

After Bander filed its notice of appeal, the court gave notice that no further action would be taken on the appeal until the Supplemental Notice (required by Rule 42(d)(iii), Del. S. Ct. Rules) was filed.[13] Pursuant to Rule 42(d)(iv)(B), Del. S. Ct. Rules, the briefing process for interlocutory appeals does not commence until "the third day following the acceptance of the interlocutory appeal . . ." The Delaware Supreme

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[12] Form A is reproduced in the appendix at pp. 6a - 9a. Form M is reproduced at pp. 10a - 12a.

[13] This notice is reproduced in the Appendix to this Brief at 13a.

Court refused Bander's appeal. Ptn. 1a – 3a. Consequently, Bander had no opportunity to brief the question presented to this Court. As there was no "opening brief" filed with the Delaware Supreme Court, Respondents' argument that Bander waived the issue presented in its Petition by not addressing it in the text of a brief to the Delaware Supreme Court (Resp. Br. 8 – 9) is unfounded and untenable.

The steps Bander took in accordance with the Delaware Supreme Court's Rules clearly alerted everyone to its claimed right of appeal pursuant to Section 16(a)(2). Respondents addressed the claimed right in their opposition to Bander's Application for Certification of Interlocutory Appeal.[14] The Court of Chancery wrote extensively on the issue in its opinion denying that Application. Ptn. 7a, n.3. The Delaware Supreme Court reviewed the Court of Chancery's opinion (*see* Ptn. 2a, ¶(1)). Its decision not to mention, much less analyze on the record, Bander's claimed right under 16(a)(2) may have been a calculated one.

This Court should not refuse to hear cases arising from state courts' refusals to recognize claimed federal rights because the state court omits to mention or analyze the claimed right on the record. Such a policy would enable state courts refusing to enforce claimed federal rights to avoid review by the simple expedient of remaining silent on the point, and this Court's constitutional role as the final arbiter of federal rights exercisable in state courts would be surrendered.

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[14] Bander was not permitted to reply to this opposition. Rule 42(c), Del. S. Ct. Rules.

4. There Is A Clear Split of Authority On The Question Presented.

Respondents deny the existence of a true split of authority on the question presented. Resp. Br. 9 – 11. They have fodder for this argument only because those state courts that have expressly recognized the applicability of Section 16(a)(2) to their proceedings have not seen any basis for argument that the statute does not apply to their proceedings. But those courts have an acknowledged obligation to examine their jurisdiction. *Smith v. Parkerson Lumber, Inc.*, 890 So.2d 832, 834 (Miss. 2003); *Championcomm.net of Tuscaloosa, Inc. v. Morton*, __ So.2d __, 2009 WL 51270, at *1 (Ala. Jan. 9, 2009); *Johnson v. Lebert Constr., Inc.*, 736 N.W.2d 878, 879 (S.D. 2007). Section 16(a)(2) was a source of the courts' jurisdiction to hear the interlocutory appeals in *Dyre Law Firm, PLLC v. Bradley*, 874 So.2d 984, 986 (Miss. 2004); *A.G. Edwards & Sons, Inc. v. Clark*, 558 So. 2d 358, 360 (Ala. 1990); and *Dakota Wesleyan Univ. v. HPG Int'l,, Inc.*, 1997 S.D. 30, ¶ 7-11, 560 N.W.2d 921, 922 - 23 (S.D. 1997). Respondents' argument that these courts did not actually decide whether Section 16(a)(2) applied in their proceedings is simply mistaken.

Respondents raise the spectre of hazards to federalism if this Court considers whether Section 16(a)(2) should be applied as Congress wrote it -- i.e., to all interlocutory orders enjoining arbitration of disputes pursuant to agreements evidencing transactions in commerce. Resp. Br. 11 – 14. This may bear on the merits of the question presented, but not on whether this Court should grant the Petition in this case. But if, as Respondents argue, the "plain statement" rule discussed in *Gregory v. Ashcroft*, 501

U.S. 452, 460 – 61 (1991) applies, it supports Bander's position in this case. As Respondents highlight (Resp. Br. 12 – 14), the FAA shows that when Congress intends to limit the reach of legislation to cases in federal courts, it knows how to do so and does so expressly. In the context of such a statute, what statement of intent that a provision apply in *all* cases could be plainer than Section 16(a)(2)?:

> An appeal may be taken from . . .
>
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; . . . .

9 U.S.C. §16(a)(2).

CONCLUSION

For all of the foregoing reasons, this Court should grant Bander's Petition and issue its writ of certiorari to the Supreme Court of the State of Delaware

Respectfully submitted,

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APPENDIX

APPENDIX 1

Delaware Rules of Court
Rules of the Supreme Court
Part II. Appeals--General

RULE 7. COMMENCEMENT OF APPEAL

(a) Notice of Appeal. An appeal shall be commenced by a notice of appeal. The notice of appeal shall be served in duplicate upon an attorney of record for each party to the proceeding below; if there is no such attorney it shall be served upon each party in the manner provided in these Rules for service of papers. Immediately following such service, such appellant shall file with the Clerk of this Court such notice, in duplicate, together with proof of service as provided in these Rules. The Clerk shall forthwith forward the duplicate thereof to the clerk of the trial court for filing in such court. Appeals from interlocutory orders shall be governed by Rule 42.

(b) Cross-Appeal. Any party may cross-appeal from any judgment or order from which an appeal may be taken.

(c) Form of Notice of Appeal or Cross-Appeal. The notice of appeal or cross-appeal shall:

(1) *Court.* Name the court from which the appeal is taken, name the judge entering the judgment and identify the case number therein;

(2) *Party or Parties; Attorney or Attorneys.* Name the party or parties taking the appeal and the party or parties against whom the appeal is taken and provide the name and address of each party's attorney of record below, except as hereafter provided;

(3) *Judgment Reviewed.* Designate the judgment or order, or part thereof, sought to be reviewed and the date thereof and, in a direct appeal of a criminal conviction, state the names of all codefendants with whom the appellant was tried, the date of the sentence from which the appeal is taken; and where the appeal is taken more than 30 days after the entry of the judgment or order sought to be reviewed, the factual and legal grounds for the appeal time being tolled;

(4) *Attorneys for Parties Against Whom the Appeal Is Not Taken.* Designate by name and address the attorney of record for each other party to the proceeding below against whom the current appeal is not taken;

(5) *Pro Se Litigants.* If there is no such attorney for any party, designate the name and last known address for each such party;

(6) *Transcript.* Contain the designations of the transcript as required by Rule 9(e); and

(7) *Forms.* Comply substantially with Official Forms A and B of these Rules. The provisions of subsections (4) and (5) above shall apply generally in any appeal including all direct appeals of criminal convictions whenever the appellant, in compliance with subsection (3) above, identifies the codefendants with whom appellant was tried.

(8) *Appeal Caption.* The caption of the appeal shall contain only the names of the parties below taking the appeal and the names of the parties against whom the appeal is taken.

(9) *Copy of Judgment to Be Reviewed.* A copy of the order of judgment sought to be reviewed, and any separate rationale for it, if available, shall be attached to the notice of appeal and to the notice of cross appeal if different from the notice of appeal, and if not available, a statement indicating such unavailability shall be included.

(d) Use of Pseudonyms. All appeals concerning domestic relations matters shall be captioned and reported with the full names of the individual parties, except that the following shall be captioned and reported by use of appropriate pseudonyms selected by the Court: matters concerning adoption, termination of parental rights, child custody and visitation, juvenile delinquency proceedings and any other domestic relations matters, which in the discretion of the trial court, a lower appellate court or this Court, are deemed to be of a sensitive nature. In such cases, the parties shall, within 10 days of the filing of the notice of appeal submit to the Court for its approval a stipulation providing for the use of pseudonyms, which sets forth and is consistent with the pseudonyms used in the court below or, in the absence of a stipulation, the Court may order the use of pseudonyms sua sponte.

(e) Joint or Several Appeals. Any 2 or more parties interested jointly, severally or otherwise in a judgment or order may join in an appeal therefrom, or any of them may appeal separately. When parties have filed

separate timely notices of appeal, the appeals may be joined or consolidated by the Court.

(f) Death of a Party.

(i) *Before Notice of Appeal Is Filed.* In civil cases, if a party entitled to appeal shall die before filing a notice of appeal, the same may be filed by the personal representative of the party; if the party has no personal representative, the same may be filed by the attorney of record for the party in the trial court within the time prescribed by law.

(ii) *After Notice of Appeal Is Filed.* After a notice of appeal is filed, substitution of parties shall be effected in accordance with these Rules.

(g) Disclosure of Corporate Affiliations and Financial Interest. Each party shall file a Disclosure of Corporate Affiliations and Financial Interest, as provided for in Form P of these Rules, within fifteen (15) days of the notice of docketing the appeal, or concurrently by a party with the filing of a motion or other document seeking to expedite the proceedings, and within two (2) days of service of such a document by all other parties. However, when the State of Delaware or any other governmental entity is a party, a Disclosure of Corporate Affiliations and Financial Interests shall be filed only if that party has pertinent information to report.

CREDIT(S)

[Amended effective April 1, 1998; amended effective April 1, 1999.]

COMMITTEE COMMENTARY

Reference: Former Rule 5. An appeal may be commenced only by a notice of appeal. The prior practice under Rule 5(2) and 5(3) of filing a praecipe for the issuance of a writ is abolished. The notice of appeal no longer needs to be accepted. Compare, Trowell v. Diamond Supply Co., 47 Del. 422, 91 A.2d 797, 802 (Supr.1952). It need only be served. See Official Forms A and B.

Sup.Ct.Rules, Rule 7, DE R S CT Rule 7

Current with amendments received through 1/1/2009

APPENDIX 2

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

[1]_____,

[2]_____ Below,
Appellant,

No. [5]_____, 19___

v.

[3]_____,

[4]_____ Below,
Appellee.

NOTICE OF APPEAL

To: [6]_____

PLEASE TAKE NOTICE that [1]_____, [2]_____ below-appellant, does hereby appeal to the Supreme Court of the State of Delaware from the [7]_____ of the [8]_____, in and for [9]_____ County, by [10]_____, dated [11]_____, in [12]_____ in that court. A copy of the decision sought to be reviewed is attached hereto. [13]

The name and address of the attorney below for appellee is [6]_____. The party

against whom the appeal is taken is [3]_____.

The name and address of the attorney below for the party against whom the appeal is not taken is [14]_____. The party against whom the appeal is not taken is [15]_____.

PLEASE TAKE FURTHER NOTICE that appellant hereby designates the transcript in accordance with Rules 7(c)(6) and 9(e)(ii) in the following manner:

[16]_____
[or] [17]_____

Dated: _____ _____

[18]_____
Attorney for [1]_____
[2]_____ Below-Appellant

Instructions for Insertions:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Leave blank. The Supreme Court Clerk's Office will assign an appeal number upon receipt of the notice of appeal.

[6] Name and address of the appellee's counsel.

[7] Substantive nature of the decision from which the appeal is taken.

[8] Lower court.

[9] County in which the lower court sits.

[10] Name of the judge who rendered the decision on appeal.

[11] Date of the decision on appeal (and the date of the final order, if different).

[12] Complete lower court case number.

[13] Attach a copy of the decision sought to be reviewed, if available. If the decision is not available, include in the notice of appeal a statement indicating such unavailability.

[14] Name and address of the counsel for the party against whom the appeal is not taken, if any.

[15] Name of the party against whom the appeal is not taken, if any.

[16] If ordering the preparation of transcript for the appeal, either designate transcript or state that a separate designation of transcript is set forth in attached Exhibit A. Whether stated within the notice of appeal or in an attached Exhibit A, the designation should clearly identify by name, date and time, the proceedings, or part thereof, that need to be transcribed for the appeal.

[17] If not ordering the preparation of transcript, either state that here or state that Statement in Lieu of Transcript in accordance with Official Form D is attached hereto.

[18] Name, address, telephone number and Delaware Bar ID number of the appellant's counsel.

APPENDIX 3

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

[1]_____,

[2]_____ Below,
Appellant,

No. [5]_____, 19___

v.

[3]_____,

[4]_____ Below,
Appellee.

NOTICE OF APPEAL FROM
INTERLOCUTORY ORDER

To: [6]_____

PLEASE TAKE NOTICE that [1]_____ hereby petitions this Court to accept an appeal from an interlocutory order of the [7]_____ and represents as follows:

(1) The interlocutory order was entered on [8]_____;

(2) Application for certification was filed in the trial court on [9]_____;

(3) Response by appellee was filed in the trial court on **[10]**_____.

(4) The action of the trial court with respect to such application was as follows: **[11]**_____.

The name and address of the attorney for appellee is as follows: **[6]**_____.

The party(ies) against whom the appeal is taken is (are) **[3]**_____.

Dated: _____

[12]_____
Attorney for **[1]**_____
[2]_____ Below-Appellant

Instructions for Insertions:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Leave blank. The Supreme Court Clerk's Office will assign an appeal number upon receipt of the notice of appeal.

[6] Name and address of the appellee's counsel.

[7] Trial court.

[8] Date of the interlocutory decision (attach a copy).

[9] Date that application for certification was filed in the trial court

[10] Date that response to the application for certification was filed by the appellee.

[11] Action by trial court, if any, on the application for certification.

[12] Name, address, telephone number and Delaware Bar ID number of the appellant's counsel.

APPENDIX 4

SUPREME COURT OF DELAWARE

CATHY L. HOWARD
Clerk

AUDREY F. BACINO
Assistant Clerk
LISA A. SEMANS
Chief Deputy Clerk
LaTOYA S. BRADY
Senior Court Clerk
DEBRA J. ZATLOKOVICZ
Senior Court Clerk

SUPREME COURT
BUILDING
55 THE GREEN
DOVER DE 19901

P.O. BOX 476
DOVER DE 19903

(302) 739-4155
(302) 739-4156
(302) 739-8091

September 18, 2008

Daniel A. Dreisbach, Esquire
Meredith M. Stewart, Esquire

RE: ***Bander Family Partnership v. Towerhill Wealth Management, et al.***, *No.* 474, 2008 **E-FILED** (C.A. No. 3830)

Dear Counselor:

The Court has requested me to inform you that no further action will be taken upon the interlocutory appeal filed in the above captioned matter until a

supplemental notice of interlocutory appeal is filed in compliance with Supreme Court Rule 42(d)(iii).

Very truly yours,

/s/ Cathy L. Howard

cc: The Honorable Leo E. Strine, Jr.
Stephen E. Jenkins, Esquire
Richard I.G. Jones, Jr., Esquire
Register in Chancery